INDEX

CRIMINAL DOCKET

TITLE OF CASE	ATTORNEYS
THE UNITED STATES *vs.* CLIFFORD H. DAVIS WILLIAM MOORE PEGRAM VERN MAC THOGMARTIN Commr.'s Docket No. 1, Cases 47, 48, 49, 50, 51 & 52. Violation of Title 18, § 2 and 2113 (a) and Title 15 § 902(e)	*For U. S.:* H. M. RAY, *U. S. Atty., Oxford, Miss.* *For Defendant:* PAUL M. MOORE, Calhoun City, Miss. (Ct. Apptd. for Deft. Davis) Ct. Apptd. L. G. FANT, Holly Springs, Miss.—for deft. Pegram

DATE	PROCEEDINGS
11-11-67	Filed Commissioner's Warrant of Arrest and complaint for each defendant.
	Filed Commr.'s Temporary Commitment for each defendant.
11-13-67	Placed in file Plaintiff's Exhibits 1, 2, 3 & 4 filed by Commissioner Lewis.
	Entered order fixing bail for each deft. at $10,000.00 in cases Commr. No. 50, 51 and 52.
11-17-67	Entered Order, signed by Commissioner Lewis, as to all defts. fixing bail at $40,000 in Commr. cases 47, 48 and 49.
1-17-68	Filed Affidavit of Financial Status and Order Appointing Counsel-Paul M. Moore, Calhoun, City, Miss. (atty for Deft. Davis). Mailed certified copies of the above to Hon. Parham Williams, Law School, University, Miss., U. S. Atty. and U. S. Prob. Serv., deft., Ct. appt'd Counsel and Admin. Office.

1-30-68	Filed Record of Grand Jurors concurring in restricted file.
	Filed Indictment (2 counts)
2-7-68	Mailed Notice of Arraignment, set for 2-15-68 at 9:00 A. M. in Oxford, to deft. Davis and Pegram, Hon. Paul M. Moore, Atty. for Davis, U. S. Attorney, U. S. Prob. Serv., and United States Marshal.
	Mailed defts. Davis and Pegram a letter explaining the purpose of arraignment day.
2-15-68	Defendant Davis entered Plea of Not Guilty before Judge Claude F. Clayton.
3-6-68	Filed Motion Of Defendant, Clifford H. Davis For The Production Of Transcript Of Grand Jury Proceedings In Said Cause, And For Prosecution To Furnish Other Information.
3-6-68	Filed Motion to Quash Indictment And Discharge Defendant Clifford H. Davis.
3-6-68	Filed Motion For Severance Of Defendants And Separation Of Counts For Trial.
3-6-68	Mailed copies of the above three Motions to Judge Clayton at Tupelo.
3-8-68	Re: Clifford Davis—Entered Plea of Not Guilty —Given 30 days to file motions.
3-21-68	Filed Court Reporter's Transcript of proceeding had on 2-15-68 and 3-8-68. (Gordy)
3-21-68	Filed Court Reporter's Transcript as to all defendants present on 2-15-68. (Gordy)
3-30-68	Filed Response of United States To Motion Of Defendant, Clifford H. Davis, For Production of Transcript of Grand Jury Proceeding In Said Cause, And For Prosecution To Furnish Other Information. Mailed copy to Judge Clayton.
3-30-68	Filed Response of United States To Motion of Defendant, Davis, For Severance And Separa-

tion of Counts For Trial. Mailed copy to Judge Clayton.

4-15-68 Mailed Notice of Trial set for Monday, May 6, 1968, to all counsel of record.

5-1-68 Filed Response of United States of Motion of Defendant, Clifford H. Davis, to Quash Indictment and Discharge Defendant, Clifford H. Davis.

5-6-68 Filed Stipulation-refused by attorney for Davis.

5-6-68 Filed Jury Panel for Clifford Davis.

5-8-68 Filed Government's Proposed Instruction No. 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20.

5-8-68 Filed Defendant's Proposed Instruction No. 1, & 2.

5-8-68 Filed Jury Verdict on Clifford H. Davis—"We, the Jury, find the defendant, Clifford H. Davis, Guilty as charged in Count One of the Indictment."

5-21-68 Filed Motion on Behalf of Defendant Clifford H. Davis for New Trial. Handed copy of same to Judge Keady's secretary.

5-24-68 Filed Order for Dismissal on Clifford H. Davis dismissing Count 2 of the Indictment.

5-24-68 Filed Notice of Appeal for Deft. Davis. Mailed copy to H. M. Ray. MB27, p. 459.

5-24-68 Filed Application to proceed without prepayment of costs, Affidavit in Support Thereof, and Order for Defendant Davis.

5-24-68 Entered Order for Def. Davis. MB27, page 460.

5-24-68 Entered Judgment and Commitment for Def. Davis-MB27 p. 462.

5-27-68 Filed Court Reporter's transcript of proceedings held before Jedge Keady, 5-24-68. Davis.

5-28-68 Mailed Statement of Docket Entries with a copy

of Pauper Affidavit & Order as to Def. Davis to Clerk's Office, U. S. Court of Appeals, Fifth Circuit, N. O., La.

5-29-68 Mailed xerox copy of Notice of Appeal as to Deft. Clifford H. Davis, with copy of Order Appointing Counsel, to Clerk, U. S. Circuit Court of Appeals, Fifth Circuit, New Orleans, La.

5-29-68 Re: Deft. Clifford H. Davis—Filed Voucher, submitted by Atty. Paul M. Moore in the sum of $638.52, approved by Judge Keady on May 28, 1968. Forwarded the original with copy of Order Appointing Counsel to Administrative Office for payment.

6-4-68 Entered Order granting deft. Davis copies of the transcripts of the proceedings at which he was arraigned and sentenced, signed by Judge Keady, in MB 27, pp. 466-67. Mailed certified copy of order to Mrs. Elizabeth Evans, Official Ct. Reporter. Mailed Notice of Entry of above order to Paul Moore and H. M. Ray.

6-20-68 Re: Clifford H. Davis: Received and placed letter in jacket file to Judge William C. Keady, dated 6-7-68, from Deft. Davis.

6-27-68 Received and Entered Order granting court reporter additional time to prepare transcript in MB 27, page 407. Mailed Notice of entry and cert. copy of Order to Elizabeth Evans and Clerk, US Court of Appeals. Notice sent to US Atty. & Atty. Moore

8-2-68 Re: Clifford H. Davis: Filed court reporter's transcript of proceedings, the original & copy, had at Oxford before Chief Judge William C. Keady, on May 6 & 7, 1968; at 9:00 a.m. and May 8, 1968 at 8:30 a.m. (Three volumes) (Elizabeth Evans)

8-5-68 Entered Order, signed by Judge Keady on Aug. 2, 1968, extending the time for filing the record on appeal for an additional 14 days. M. B. 27, pg. 480.

8-5-68	Mailed Notice of entry of Order to H. M. Ray, U. S. Attorney & Paul Moore, Court appointed attorney. Mailed copy of order to Mrs. Elizabeth Evans, Court Reporter, Clarksdale, Miss. Certified copy of order mailed to Clerk, U.S. Court of Appeals, Fifth Circuit, New Orleans, La.
8-13-68	Record on Appeal, with Exhibits, three volumes of Court Reporter's transcript, mailed to Clerk, U. S. Court of Appeals, Fifth Circuit, New Orleans, La. in two parcels by registered mail—Receipts # 165 & 166. Re: Clifford H. Davis.
9-24-68	Received Exhibits from U. S. Court of Appeals, Fifth Circuit. Exhibits were mailed in re. to Clifford H. Davis. Exhibits needed for Trial.
10-10-68	Issued Writ on defts. Davis and Pegram.
7-15-71	Filed Copy of letter from Clifford Davis to Elizabeth Evans requesting parts of his transcript. He asked that this letter be filed.
1-19-71	Filed Motion to Dismiss Indictment.
	Filed Motion for Discovery and Inspection.
3-17-71	Filed Response.
3-25-71	Filed Traverse.
6-16-71	Filed Memorandum Opinion.
	Entered order signed by Judge Keady on June 14, 1971 ordering that Motion of Clifford Davis to Vacate Sentence Be and the Same is Denied.
7-7-71	Filed Notice of Appeal
3-8-72	Filed Opinion of the Fifth Circuit Court of Appeals, dated January 20, 1972.
	Filed Judgment issued as Mandate on March 6, 1972—Order of District Court.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

CLIFFORD H. DAVIS, PETITIONER vs UNITED STATES OF AMERICA	C.R.W. 6835 Civil WC 71-2-K

MOTION TO DISMISS INDICTMENT—filed January 19, 1971

Comes now the petitioner, *Clifford H. Davis* pro-se, and moves this Honorable Court pursuant to title 18 U.S.C.A Section 2255, to enter an order dismissing the indictment (C.R.W. 6835) returned by the Grand Jury setting at Greenville, Mississippi, January 30, 1968, as being an unconstitutional array, inasmuch as it did not meet the mandatory requirement of the statute laws set forth by the United States Congress in title 28, U.S.C.A. Section 1861, 1863, 1864, and the 5th amendment of the United States Constitution, to wit:

1.

Petitioner is incarcerated in the United States Penitentiary, Leavenworth, Kansas pursuant to a fourteen (14) year judgment entered in the United States District Court for the North District of Mississippi in violation of 18 U.S.C.A. Section 2113 (A), Sec. 2. "Bank Burglary" conviction was by jury.

2.

Petitioner aver that the proceeding prior to attending the presentment of the indictment C.R.W. 6835 petitioner was arbitrarily deprived of the protection of Sections 1861, 1863 and 1864, title 28 U.S.C.A. in the aforesaid manner prescribed in these sections clause by the jury commissioner and Clerk of Court in preforming their duties.

3.

Petitioner aver that the selection of this Federal Grand Jury setting for the Northern District of Mississippi, Greenville, Mississippi, January 30, 1968, and those prior to the past 20 years has been employed in violation of the 5th amendment due process clause and equal protection therefrom.

4.

Petitioner aver because of the inhereafter reasons in the below averments A, B, C, D, therewithin, the indictment returned against this negro petitioner C.R.W. 6835 on January 30, 1968, must be rendered as void, dismissing said indictment C.R.W. 6835 and any and all orders entered pursuant to said indictment.

(a) that the Grand Jury Array which returned the indictment C.R.W. 6835 was knowingly illegally impounded in violation of the due process of the 5th amendment, which gives equal protection to *All American Citizens* of these United States who are competent, the right and civil duty to seven on the Federal Grand Jury Array. Section 1861.

(b) that the jury commissioner and Clerk of Court for the Northern District of Mississippi for the past 20 years implementing the "Keyman" and "Selectors", system cause nought to token in their selection of prospective qualifying negro jurymen because of their race and color in violation of Section 1863.

(c) that the Northern District Court has by its affirmative action taken for the past 20 years has acquiesced to systematically, purposefully, unlawfully and unconstitutionally excluded the prospective qualified resident negroes from the Grand Jury box in violation of Section 1864.

(d) that the petitioner being a member of the negro race has been prejudiced by the aforesaid violation caused by the violators in carrying out their duties, and has denied petitioner his constitutional right, guaranteed to him by the Sixth Amendment, the right to a fair cross-section of the community.

5.

Petitioner avers he had not waived nor abandoned this right to contest the Grand Jury array as setforth in the Federal Rules of Criminal Procedure Rule 12(B).

6.

Petitioner avers that the court's appointed *Law Student*, who was researching the Grand Jury array question within, was *stopped* from seeing petitioner by the Lafayette County Sheriff, whereas this point of law was lost as to the research necessary to carry the burden which it places upon the "defendant".

7.

Petitioner avers that a timely oral motion was made in open court *before trial* by his Court appointed lawyer, *Mr. Paul M. Moore,* Calhoun City, Mississippi, said motion was then denied by the trial Judge, *Honorable William C. Keady.* Petitioner's counsel did not assign this as error on direct appeal.

WHEREFORE, the petitioner prays that this Court serve notice upon the United States Attorney, grant a prompt hearing thereon with the petitioner present to give testimony to determine the issues by making a finding of facts and conclusions of law and discharge the petitioner for service of the sentence or what other relief the Court deems necessary.

Respectfully submitted,
/s/ Clifford H. Davis
CLIFFORD H. DAVIS-*Pro-Se*

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

CLIFFORD H. DAVIS, PETITIONER VS UNITED STATES OF AMERICA RESPONDANT	C.R.W. 6835 Civil No.

MOTION FOR DISCOVERY AND INSPECTION—filed January 19, 1971

TO: The United States Attorney:

You are hereby notified that as soon as this motion can be heard by the court *Clifford H. Davis* appearing in propria persona, can be heard in the Courtroom so designed. United States Courthouse, Oxford, Mississippi 38655, petitioner herein make the following motion for discovery and inspection, to include:

That the Court order the United States District Court Clerk, and Jury Commissioner to permit the petitioner to inspect, copy and/or photograph pertinent records of the Grand Jury and general venire providing the following information and/or statistics:

1. Any documents, memorandums or written data sitting forth the course or method used to obtain names of prospective jurors, for the year 1968 and twenty years past.

2. Any documents, memorandums, or written data setting forth the standards of qualifications applied to prospective jurors in compiling the jury list for the Northern District of Mississippi for the year 1968 and twenty years past.

3. Copy of questionnaire mailed to prospective jurors during the year 1968 and for each of the twenty years past.

4. The number of persons on the 1968 jury list and each of the twenty years past.

5. The number of questionnaires mailed to prospective jurors during the year 1968 and for each of the twenty years past.

6. The number of questionnaires returned in 1968 and for the twenty years past.

7. The number of questionnaires carryovers from 1967 jury list and for each of the twenty years past.

8. The number of Negro carryovers from 1967 jury list and for each of the twenty years past.

9. The number of new names added to the list in 1968 and for each of the twenty years past.

10. The number of Negro among the new names added to the jury list in 1968 and for each of the twenty years past.

11. The number of questionnaires returned too late in 1968 and for each of the twenty years past.

12. The number of persons exempted from jury service because of business or occupation in 1968 and for each of the twenty years past.

13. The number of persons exempted from jury service because of age or health in 1968 and for each of the twenty years past.

14. The number of women exempted from jury service because of small children to care for in 1968 and for each of the twenty years past.

15. The number of persons exempted for other reasons (felony conviction, illiteracy, civil service employment, etc.) in 1968 and for each of the twenty years past.

16. From the questionnaires returned in 1968 and for each of the past twenty years, how many were finally selected for the jury list.

17. The number of persons on jury list from Carroll County Mississippi? Negros on list? Adult population for the year 1960.

18. The number of persons on jury list from Humphreys County, Mississippi. Negros on list. Adult population of the year 1960.

19. The number of persons on jury list from Leflore County, Mississippi, Negros on list. Adult population for the year 1960.

20. The number of persons on jury list from Sunflower County, Mississippi. Negros on list. Adult population for the year 1960.

21. The number of persons on jury list from Washington County, Mississippi. Negros on list. Adult population for the year 1960.

22. The number of persons 21 years and over residing in the Northern District of Mississippi.

This Motion is urged pursuant to rule 16(b) of the Federal Rules of Criminal Procedure. The particularized need for the foregoing is predicated on the attached Motion to Dismiss the Indictment C.R.W. 6835, said request being both reasonable and material to the petitioner's defense.

In passing on Rule 16(b) motion, there are constitutional imperatives which cannot be disregarded. In a famous and controversial passage, the Supreme Court said:

"We now hold the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to quit or punishment, irrespective of the good faith or bad faith of the prosecution. *Bandy v. State of Maryland* 373 U.S. 83, 104, 10 L Ed 2d 21.5 83s ct 1194 (1963). There has been much learned debate as to how far the rule thus laid down should go. For the Federal Courts at least, the adoption of amended Rule 16 may make it unnecessary to decide that question. Since Rule 16(b) clearly permits discovery more broadly than due process requires, in doubtful cases courts should grant discovery sought under the rule and avoid the constitutional question. Liberality in passing on discovery motions under this rule also would be consistent with Supreme Courts recognition that disclosure, rather than suppression of relevant materials ordinarily promotes the proper administration of criminal justice. *"Dennis v. United States* 1966. 86 S Ct 1840. 1849. 384 U. S. 855, 869, 16 L Ed 2d 973".

Also see Mobely v. United States 379, F 2d 768 5 cir (1967) where the fifth Circuit Court of Appeals in its instructions on remand told the district court to allow Mobely to inspect whatever needed records for Mobely to carry his burden, "commissioner files, etc."

WHEREFORE, in consideration of the foregoing taken in

connection with petitioner's affidavit in support of Motion to Dismiss Indictment, it is prayed that this court will grant motion and thus permit petitioner to effectively carry his burden to Dismiss indictment C.R.W. 6835.

Respectfully submitted,
/s/ Clifford H. Davis
CLIFFORD H. DAVIS, *Pro-Se*
P.M.B. 92164-131
Leavenworth, Kansas

Subscribed and sworn to before me this 11th day of January 1971.

E. J. JOHNSON,
Parole Officer,
United States Penitentiary,
Leavenworth, Kansas

Authorized by the Act of July 7, 1956
administer oaths (18 U.S.C. 4004).

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

CLIFFORD H. DAVIS, PETITIONER
v.
UNITED STATES OF AMERICA, RESPONDENT
Civil No. WC 712-K

RESPONSE—filed March 17, 1971

Comes now the United States of America by H. M. Ray, United States Attorney for the Northern District of Mississippi, and in response to this Court's order to show cause and in answer to petitioner's motion to vacate judgment and sentence, denies each and every allegation of said motion and alleges that:

1. Petitioner's motion is made pursuant to 28 USC, Section 2255, and this Court has jurisdiction thereof;

2. Petitioner was represented by counsel throughout the proceedings in WCR-6835, including arraignment, jury trial, motion for new trial and appeal to the United States Court of Appeals for the Fifth Circuit, and at no time raised any objection that the grand jury which indicted him was defectively constituted because of the systematic exclusion of Negroes, all of which appears from the records and files, Case No. WCR-6835.

WHEREFORE, respondent prays that the court entertain and determine petitioner's motion without requiring the production of the prisoner at the hearing and that upon the hearing thereof the court deny petitioner's motion for the reason that the motion and files and records of the case conclusively show that petitioner is entitled to no relief.

H. M. RAY
United States Attorney

/s/ ALFRED E. MORETON III
Assistant United States Attorney

CERTIFICATE OF SERVICE (Omitted in printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI

WESTERN DIVISION

CLIFFORD H. DAVIS,
PETITIONER

vs.

UNITED STATES OF AMERICA,
RESPONDENT

Civil No. W.C. 712-K

TRAVERSE TO RESPONSE PURSUANT TO CIVIL RULES OF PROCEDURE RULE 12—filed March 25, 1971

Comes now the petitioner in his traverse to the government response and dispute same as being erroneously stated and arbitrary cited as a matter of applicable law governing the factual situation involved within, to wit;

(1). Petitioner consent to paragraph (1) of the response at true.

(2). Petitioner dispute paragraph (2) inasmuch as to the statement that petitioner fail to object to the grand jury array, and the records reflex that no objection appears from the records and files in Case. No. W.C.R. 6835.

(3). Petitioner dispute respondent memorandum brief and the case law cited within as being not applicable under petitioner set of circumstances presented before the Court.

(4). For the Respondent to ask this Court to denied this addmitted timely petition on the first part of a paragraph of Rule 12(b)(2) Federal Rules of Criminal Procedure on the waiver clause within, based upon the filed and records he bring befor the Court without a ful reading of the entire Rule 12 or a ful evidentiary hearing would ask's the Court to cause more dispensation to the petitioner already violated constitutional rights to bring forth before this Court evidence necessary to carry his burden of proof of illegality in the selection of the Grand Jury Array for the Northern District of Mississippi, which indicted this Negro petitioner.

(5). Petitioner incorporate all filed and record had in the proceeding of W.C.R. 6835, and calls special attention

to the *6th day of May 1968* and moves this Honorable Court to take judicial notice of his personally knowledge of said day May 6, 1968, whereas the Courts' Reported record will clearly reveal that petitioner Court appointed lawyer. *Mr Paul Moore* raise the defense to the indictment on the precise question within and pursuant to Rule 12(b)(2) whereas the United States Attorney *Mr. H. M. Ray* responded to said oral motion, and *your Honor* who was presiding judge *William C. Keady,* denied said oral motion *before trial* that day which is the day the Court inform *Mr Paul Moore* that the Court was going to hear and act upon *all pre-trial* motion in said cause (see Federal Rules of Criminal Procedure Rule 12, (3)(4)(5).

(6). Petitioner ahereto that Rule 12(b)(2) is binding upon him in pleading said cause, however the entire rule is applicable and must be consider in context and not what the respondent feel is favorable to him. The very next sentence of this Rule 12(b)(2) stated:

> "but the Court for cause shown may grant relief from this waiver"

The only answer to the respondent is that the Court set the date and entertain all pre-trial motion as he seen fit. "Rule 12, (3)(4)(5). If this be a mistake respondent should censor the Court, and not the petitioner.

(7). The petitioner respectfully requested that this Honorable Court takes special notices that the respondent only contradiction of petitioner averments comes within a blanket statement that he "denies each and every allegation of said motion." Yet the controversy before this Court is one of whether the Grand Jury Array, seting in the Northern District of Mississippi and those for the past (20) years has been constitutionally selected, free from race discrimination in its choosing prospective qualifying Negro juror's as setfore in *title 28 U.S.C.A. Chapter 121 Juries; Trial by Jury* Section 1861 thought 1874—that the *sole issue.* If the respondent could answer this question in the affirmative all other thing alledged would be meaningless and superfluous.

The respondent with he wide source of available information does not attempt to justify these arrays nor defend said arrays nor it administertor from the alledges discrimi-

nation tactics used against negro that cause the system to produce the illegal arrays, pursuant to Chapter 121, title 28 U.S.C. Section 1861 thought 1874.

(8). Such a meek response which totally disputatious of the main issue involved must be closely consider, if not seen by this Court as to the respondent acquiesce to petitioner contention; surly the respondent response made in paragraph (2) which in its self is an ambiguous statement can not over comes the great weight of factual issue petitioner presented.

The Court may well note, that this black petitioner consented to *no waiver* of rights before the Court, and the Court appointed attorney *Mr Paul Moore* repeatly objected thought out the trial, from the first day of pre-trial motion hearing to the time the judgment was imposed. Said relief should be granted.

Respectfully Submitted
/s/ Clifford H. Davis
CLIFFORD H. DAVIS-*Pro-Se*
P.M.B. 92164-131
Leavenworth, Kansas 66408

Dated:
March 22, 1971

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI

CLIFFORD H. DAVIS, PETITIONER v. UNITED STATES OF AMERICA, RESPONDENT	No. WC-712-K

MEMORANDUM OPINION—June 14, 1971

The petitioner, Clifford H. Davis, was, on May 8, 1968, convicted after a trial by jury of entering, together with other persons, aiding and abetting each other, the First National Bank of Hickory Flat, Mississippi, being a branch of the First National Bank of New Albany, Mississippi, the deposits of which were insured by the Federal Deposit Insurance Corporation, with intent to commit a larceny therein, in violation of 18 U.S.C., Sections 2 and 2113(a), and upon his conviction was sentenced to be imprisoned for a term of fourteen years. *United States of America v. Clifford H. Davis,* (CRW 6835 ND Miss.) Pursuant to the sentence of the court petitioner is confined at the United States Penitentiary, Leavenworth, Kansas.

Following petitioner's conviction, his attorney filed a motion for new trial, which was denied. An appeal *in forma pauperis* to the United States Court of Appeals for the Fifth Circuit was allowed and perfected. The Fifth Circuit affirmed. *Davis v. United States,* 409 F.2d 1095 (5 Cir. 1969). Subsequently petitioner filed motions in this court seeking post conviction relief, all of which have been denied. No useful purpose would be served by detailing the substance of those motions, but it should be observed that in none of them was the point upon which petitioner now relies submitted to the court. The same may be said of petitioner's motion for new trial and his appeal to the Fifth Circuit.

Upon request of petitioner, this court, on January 18, 1971, granted him leave to file *in forma pauperis* a motion to vacate his sentence under 28 U.S.C., Section 2255. Respondent was allowed until March 18, 1971, within which

to show cause why the prayer of said petition should not be granted, and petitioner was allowed twenty days within which to file with the court any additional grounds for relief under Section 2255, with the provision that such additional grounds should be deemed waived and forever barred unless filed with the court within said period of time.

On March 17, 1971, respondent filed its response with supporting memorandum brief. On March 25, 1971, petitioner filed his traverse.

The basis for petitioner's motion for relief under Section 2255 is his allegation that procedure followed in selecting the grand jury by which he was indicted resulted in the systematic under-representation of Negroes thereon in violation of petitioner's rights under the Fifth Amendment to the Constitution and of the provisions of 28 U.S.C., Sections 1861, 1863 and 1864.[1] Petitioner is black. Petitioner has alleged no additional grounds upon which he believes himself entitled to relief under 28 U.S.C., Section 2255, and, pursuant to the terms of the court's order of January 18, 1971, any such grounds are hereby found to have been knowingly and intentionally waived by petitioner. In its response, the United States takes the position that petitioner waived any objections to the composition of the grand jury by failure to object before trial, citing Rule 12(b)(2), FRCrP.

After considering the petition, response and traverse, the court invited additional briefs on the question of whether or not petitioner had waived his objections to the composition of the grand jury, and specifically requested discussion of the effect of *Cobb v. Balkcom*, 339 F.2d 95 (5 Cir. 1964) and other relevant cases. Petitioner and respondent filed supplemental briefs on April 20, 1971 and April 21, 1971, respectively.

Before dealing with the issues of law presented by the petition and the government's response, it is necessary to consider a factual issue raised by petitioner which can be

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[1] The 1968 amendments to 28 U.S.C., Section 1861, *et seq.*, known as the "Jury Selection and Service Act of 1968" were not applicable to petitioner's indictment or trial, since the grand jury's indictment had been returned and his petit jury impaneled prior to the effective date of the amendments. See note following 28 U.S.C., Section 1861.

fully disposed of by reference to the transcript and files. Petitioner claims that an objection to the composition of the grand jury was made by oral motion of petitioner's attorney and denied by the court before trial in open court on May 6, 1968, the day on which petitioner's trial commenced. He contends, therefore, that there could be no waiver under Rule 12(b)(2) since a proper motion was made before trial. The Court recalls no such oral motion having been made. In order to avoid any possible oversight injurious to the rights of petitioner, the court has read in full the transcript of the proceedings at every stage of petitioner's prosecution and has read the entire jacket file, including docket entries. These voluminous records reveal that not the slightest reference was made to the composition of the grand jury either by petitioner or by his attorney at any stage of the proceedings. Petitioner's attorney did file, on March 6, 1968, a motion to quash the indictment on the ground that the arrest of petitioner was illegal, and that the indictment of the grand jury based upon evidence obtained pursuant to such alleged illegal arrest was void. No reference was made in that motion to the composition of the grand jury. The motion to quash was denied by the court prior to the commencement of trial on May 6, 1968. The substance of the motion was also the substance of the appeal to the Fifth Circuit. *Davis v. United States, supra.* Moreover, petitioner was present at his arraignment on March 21, 1968, at which time his attorney requested and was allowed a period of thirty days within which to file additional pretrial motions. See Rule 12(b)(3) FRCrP. The transcript also reveals that petitioner was present when the motion to quash the indictment on the ground of the alleged illegal arrest was submitted to and denied by the court. The court finds, therefore, that petitioner did not object to the composition of the grand jury prior to trial and did not raise such an objection at any other stage of the proceedings, including his trial, motion for new trial, appeal, nor in his various post conviction motions, until the filing of the petition now before the court.

The Supreme Court in *Fay v. Noia*, 372 U.S. 391, 83 S.Ct. 822 (1963) held that in a collateral attack upon a state court conviction by way of federal habeas corpus, a criminal

defendant is not to be deemed to have waived a federal constitutional right unless it is determined that the defendant knew of the existence of the right and intentionally relinquished or abandoned it. Such a waiver was there characterized as ". . . the considered choice of the petitioner." 372 U.S. at p. 439, 83 S.Ct. at p. 849. The same standard was made applicable to federal prisoners in *Kaufman v. United States*, 394 U.S. 217, 89 S.Ct. 1068 (1969). However, neither *Fay v. Noia, supra,* involving a petition for habeas corpus relief by a state prisoner, nor *Kaufman v. United States, supra,* involving a petition under 28 U.S.C., Section 2255 complaining of the use on trial of evidence obtained by means of an illegal search and seizure, required the Supreme Court to interpret Rule 12, FRCrP, as neither of the cited cases involved the specific type of defect in the proceedings dealt with by the rule.[3]

In promulgating Rule 12, the Supreme Court provided that objections based on defects in the institution of the prosecution or in the indictment or information must be raised by pretrial motion or they are waived. Exceptions are provided as to jurisdictional defects and the failure of the indictment on its face to charge the defendant with the commission of an offense. The rule vests in the trial

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[3] The pertinent provisions of Rule 12 are as follows:

* * *

(b) *The Motion Raising Defenses and Objections.*

* * *

(2) *Defenses and Objections Which Must Be Raised.* Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the pendency of the proceeding.

(3) *Time of Making Motion.* The motion shall be made before the plea is entered, but the court may permit it to be made within a reasonable time thereafter.

* * *

court discretion to grant relief from the waiver *for cause shown.*

In *Shotwell v. United States,* 371 U.S. 341, 83 S.Ct. 448; reh. den., 372 U.S. 950, 83 S.Ct. 931 (1963), decided at the same term as *Fay v. Noia, supra,* the Supreme Court held that under Rule 12(b)(2) a federal criminal defendant who failed to object to alleged defects in the composition of the grand and petit juries before trial waived such objections. The complaints in *Shotwell* concerning jury composition were that the jury commissioner delegated his selection duties to one of his private employees; that volunteers were permitted to serve on the juries; and that the clerk failed to employ a method of selection designed to secure a cross-section of the population. The later ground is virtually identical with the objection raised in the petition here. Because the court is of the opinion that *Shotwell* controls this case, the controlling portions of that opinion are here quoted at length:

> "We think, as the two lower courts did, that petitioners have lost these objections by years of inaction. Rule 12(b)(2) of the Federal Rules of Criminal Procedure, 18 U.S.C.A. provides: 'Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. * * * Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver.' Petitioners concede, *as they must,* (emphasis supplied) that this Rule applies to their objection to the grand jury array, but deny that it applies to their objection to the petit jury array. On the latter point we do not agree. In Frazier v. United States, 335 U.S. 497, 503, 69 S.Ct. 201, 205, 93 L.Ed. 187, this court stated that a challenge to the method of selecting the petit jury panel comes too late when not made before trial. And the lower federal courts have uniformly held that an objection to the petit jury array is not timely if it is first raised after verdict. See, e.g., Hanratty v. United States, 5 Cir. 218 F.2d 358, 359, cert. denied, 349 U.S. 928, 75 S.Ct. 770, 99 L.Ed. 1259;

United States v. Klock, 2 Cir., 210 F.2d 217, 220; Higgins v. United States, 81 U.S. App. D.C. 371, 160 F.2d 222, 223, cert. denied, 331 U. S. 822, 67 S.Ct. 1304, 91 L.Ed. 1839; United States v. Peterson, D.C. 24 F.Supp. 470.

Petitioners have not advanced any reasons for overturning this settled course of decision. Rather, they argue that when public officials violate constitutional rights by actions whose illegality is not readily noticeable by the litigants or their counsel, sufficient cause has been shown to warrant relief from application of the Rule. Ballard v. United States, 329 U.S. 187, 67 S.Ct. 261, 91 L.Ed. 181, is said to stand for the broad proposition that technical rules of procedure do not prevent this Court from considering the merits of a basic challenge to the method of jury selection.

In the circumstances of this case, petitioner's contions are without foundation. In denying the motions the District Court found that the facts concerning the selection of the grand and petit juries were notorious and available to petitioners in the exercise of due diligence before the trial. The same method of selecting jurors in the district had been followed by the clerk and the jury commissioner for years. Inquiry as to the system employed could have been made at any time. Indeed, the acceptance of volunteers for the juries had received publicity in the newspapers, and their presence on the petit jury could have been ascertained at the time it was constituted. And Ballard lends no support to petitioners' position, for in that case the challenge to the jury panel had been timely made and preserved. See 329 U.S., at 190, 67 S.Ct., at 262.

Finally, both courts below have found that petitioners were not prejudiced in any way by the alleged illegalities in the selection of the juries. Nor do petitioners point to any resulting prejudice. In Ballard it was said (at p. 195, 67 S.Ct. at p. 265) that 'reversible error does not depend on a showing of prejudice in an individual case.' However, where as here, objection to the jury selection has not been timely raised under Rule 12(b)(2), it is entirely proper to take absence

of prejudice into account in determining whether a sufficient showing has been made to warrant relief from the effect of that Rule.

We need express no opinion on the propriety of the practices attacked. It is enough to say that we find no error in the two lower courts' holding that the objection has been lost." 371 U.S. at pp. 362-364, 83 S.Ct. at pp. 461-462.

Since the decision in *Shotwell*, the Fifth Circuit has uniformly held that where such objections are not made prior to trial or plea of guilty, they are waived. *Pinkney v. United States*, 380 F.2d 882 (5 Cir. 1967); *Jackson v. United States*, 394 F.2d 114 (5 Cir. 1968); *Brooks v. United States*, 416 F.2d 1044 (5 Cir. 1969); *Bustillo v. United States*, 421 F.2d 131 (5 Cir. 1970); *Throgmartin v. United States*, 424 F.2d 630 (5 Cir. 1970). As observed in the supplemental brief of respondent, only the Ninth Circuit in *Fernandez v. Mier*, 408 F.2d 974 (9 Cir. 1969) has deviated from the line of decisions exemplified by the Fifth Circuit rule. *Fernandez* attempts to distinguish *Shotwell* as involving a direct appeal rather than a collateral attack upon the conviction under Section 2255. The logic of the *Fernandez* opinion is not persuasive, as there appears to be no good reason why an objection should be considered to have been waived if considered on direct appeal, but not waived if considered on collateral attack under Section 2255. In any event, the rule in the Fifth Circuit is otherwise.

Petitioner's objection to the composition of the grand jury is clearly an objection based upon a defect in the indictment within the meaning of Rule 12(b)(2), FRCrP. Since petitioner did not raise his objection by pretrial motion, but raises it for the first time in the petition for Section 2255 relief now before the court, he has waived the objection. Rule 12(b)(2), FRCrP. *Shotwell v. United States, supra. Pinkney v. United States, supra; Jackson v. United States, supra; Brooks v. United States, supra; Bustillo v. United States, supra; Throgmartin v. United States, supra.*

Cobb v. Balkcom, supra, is distinguishable from the case at bar in several important respects. *Cobb* was a collateral attack by way of federal habeas corpus upon a state court conviction and thus did not involve the interpretation of

Rule 12, FRCrP. *Cobb* was also factually exceptional in that the petitioner there was a minor (15 years of age) who had been convicted of murder and sentenced to suffer the death penalty. He had no previous experience in court and had never dealt with a lawyer before. He was not represented by counsel until after he had been indicted. It was conceded in that case that Negroes had for many years been systematically excluded from both grand and petit juries in the county in which Cobb was tried. *Cobb* involved an attack upon the composition of both the grand and petit juries. In its opinion in *Cobb* the Court of Appeals for the Fifth Circuit recognized the distinction drawn in *United States ex rel Goldsby v. Harpole*, 263 F.2d 71 (5 Cir. 1958), cert. den. 361 U.S. 838, 80 S.Ct. 58, 4 L.Ed.2d 78, between grand and petit juries where it is claimed that an objection to the composition thereof has been waived, although the court held that under the facts in *Cobb* the petitioner would not be deemed to have waived his objection to the composition of the grand jury. Ordinarily, an objection to the composition of a grand jury may be held to have been waived under circumstances which would not constitute a waiver of the same objection as to the composition of a petit jury. *United States ex rel Goldsby v. Harpole, supra.* There are not present in this case exceptional circumstances such as existed in *Cobb.*

Having concluded that petitioner waived his objection to the composition of the grand jury by failing to timely raise it, there remains only the question of whether or not the court should exercise its discretion to grant relief from the waiver. Rule 12(b)(2) FRCrP. Rule 12(b)(2) permits the court to grant relief from the waiver for cause shown. The Fifth Circuit has indicated in at least two recent decisions that "extraordinary circumstances" must exist before the court should exercise its discretion to grant relief. *Bustillo v. United States, supra; Throgmartin v. United States, supra.* The Supreme Court has indicated that it is proper to consider whether or not the petitioner has suffered actual prejudice in determining whether or not to grant relief. *Shotwell v. United States, supra.*

Petitioner offers no plausible explanation of his failure to timely make his objection to the composition of the grand jury. The method of selecting grand jurors then

in use was the same system employed by this court for years. No reason has been suggested why petitioner or his attorney could not have ascertained all of the facts necessary to present the objection to the court prior to trial. The same grand jury that indicted petitioner also indicted his two white accomplices. The case had no racial overtones. The government's case against petitioner was, although largely circumstantial, a strong one. There was certainly sufficient evidence against petitioner to justify a grand jury in determining that he should stand trial for the offense with which he was charged. See *United States ex rel Goldsby v. Harpole, supra,* at 263 F.2d, p. 81. The government did not require the assistance of racial prejudice in order to obtain an indictment against petitioner, and indeed petitioner does not contend that any such prejudice existed. Neither has petitioner suggested the existence of any such exceptional circumstances as would justify relief from the waiver. Petitioner has shown no cause why the court should grant him relief from his waiver of the objection to the composition of the grand jury under Rule 12(b)(2) FRCrP, and, finding no such cause, the court denies such relief.

It cannot realistically be contended in this proceeding that petitioner was not fully aware of his constitutional rights, nor that he was not fully advised in the premises. Petitioner has, in fact, demonstrated an unusually keen awareness of his constitutional rights. He was ably and vigorously represented throughout his trial and on his appeal to the Fifth Circuit by court appointed counsel who demonstrated a high degree of competence and devotion to petitioner's cause. Petitioner's attorney represented him with such distinction that the Court of Appeals for the Fifth Circuit was moved to observe: "We have rarely witnessed a more thorough or more unstinted expenditure of effort by able counsel on behalf of a client." *Davis v. United States, supra,* at 409 F.2d, p. 1101.

The court finds that the motion and the record of the previous proceedings conclusively show that the motion is wholly without merit, and an order will be entered overruling petitioner's motion for vacation of sentence without evidentiary hearing.

This the 14th day of June, 1971.

/s/ William C. Keady
Chief Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI

WESTERN DIVISION

CLIFFORD H. DAVIS,
PETITIONER

vs.

UNITED STATES OF AMERICA,
RESPONDENT

No. WC-712-K

ORDER—June 14, 1971

The motion of Clifford H. Davis, petitioner, to vacate sentence pursuant to 28 U.S.C., Section 2255 having been presented to the Court together with the response of the United States, the traverse thereof, and upon supplementary briefs filed by both petitioner and respondent, and upon examination of the records and files of said cause, the court is of the opinion that the pleadings, records and files conclusively show that the petitioner is not entitled to any relief and that the court need not conduct an evidentiary hearing for the reasons set forth in Memorandum Opinion this date issued; it is

ORDERED

That the motion of Clifford H. Davis to vacate sentence be, and the same is hereby, denied.

This the 14th day of June, 1971.

/s/ William C. Keady
Chief Judge
United States District Court

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

CLIFFORD H. DAVIS, PETITIONER
vs. WC-712-K
UNITED STATES OF AMERICA, RESPONDENT

NOTICE OF APPEAL—filed July 7, 1971

Notice is hereby given that, *Clifford H. Davis* petitioner aboved named, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the order denying petitioner *Motion to Dismiss Indictment* pursuant to 28 USCA. Section 2255 and all order entered thereon entered in these proceeding on the 14th day of June and the 23th day of June 1971.

Respectfully Submitted
/s/ Clifford H. Davis
CLIFFORD H. DAVIS-*Pro-Se*
P.M.B. 92164-131
Leavenworth, Kansas 66048

Dated:
July 2, 1971

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI

UNITED STATES OF AMERICA v. CLIFFORD H. DAVIS WILLIAM MOORE PEGRAM VERN MAC THOGMARTIN	CRW 6835

MOTION ON BEHALF OF DEFENDANT
CLIFFORD H. DAVIS FOR NEW TRIAL

Comes the defendant, Clifford H. Davis, and respectfully moves the Court to grant him a new trial for the following reason:

1.

The Court erred in denying defendant's motion for acquittal made at the conclusion of the evidence.

2.

The verdict is contrary to the weight of the competent evidence.

3.

The verdict is not supported by substantial evidence.

4.

The Court erred in not sustaining objections made by defendant to the introduction of the evidence consisting of the various items of property removed by the officers from the van truck testified to by numerous witnesses in the trial.

5.

The Court erred in not sustaining the objections of defendant to the testimony and evidence offered and introduced by the United States, showing William Moore Pegram's and Vern Mac Thogmartin's connection with the

alleged bank burglary as it served only to prejudice defendant Clifford H. Davis.

6.

The Court erred in admitting in evidence the clothing and personal effects of defendant Clifford H. Davis, as same were secured from the defendant without authority or law. The Court further erred in admitting into evidence the particles of metal, brick, mortar and paint and other debris allegedly found in the clothing of defendant Clifford H. Davis, and all testimony in reference to the analysis thereof and opinions based upon the said analysis for the reason that same were secured from the clothing of defendant without authority in law.

7.

The Court erred in charging the jury and in refusing to charge the jury as requested.

8.

It was prejudicial error for the United States to stop defendant's attorney in arguing that the witness Highway Patrolman Inspector Warren admitted that he had given contradictory testimony in a state hearing immediately following the alleged bank burglary. It was further prejudicially wrong for the Court to direct the attorney for the defendant to argue to the jury only briefly on this point.

9.

The Court erred in denying defendant's motion for exclusion of the testimony and evidence offered by the United States at the conclusion of the evidence.

/s/ Paul M. Moore
PAUL M. MOORE
P. O. Box 230
Calhoun City, Mississippi
Attorney for Defendant

CERTIFICATE OF SERVICE (omitted in printing)

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF MISSISSIPPI—WESTERN DIVISION

UNITED STATES OF AMERICA
v.
CLIFFORD H. DAVIS
WILLIAM MOORE PEGRAM
VERN MAC THOGMARTIN
Cause No. CRW6835

MOTION TO QUASH INDICTMENT AND
DISCHARGE DEFENDANT
CLIFFORD H. DAVIS

Comes now Clifford H. Davis, one of the defendants in the above entitled and numbered cause, by and through his Attorney, Paul M. Moore, and respectfully moves the Court to quash and vacate the indictment returned against him, as to both counts thereof, and assigns as reasons therefor the following:

That on November 7, 1967, and at the time it is alleged in the indictment that the criminal acts allegedly performed by defendant, Clifford H. Davis, that the said defendant, Clifford H. Davis, was arrested by one Jesse M. Ash, Sheriff of Marshall County, Mississippi. That the said arrest was made by the said Jesse M. Ash in Hickory Flat, County of Benton, Mississippi, and without being armed with a warrant. That at the time of said arrest of this defendant, the said Jesse M. Ash was without any legal authority as he was outside the county of his authority and jurisdiction. That at said time the said Jesse M. Ash had no legal knowledge that a felony or any crime had been committed. That the defendant, Clifford H. Davis, committed no crime, either a felony or a misdemeanor, in the presence of said Jesse M. Ash, and that at the time of the said arrest there was no reasonable cause for the said Jesse M. Ash to make the arrest of the defendant, Clifford H. Davis. That there was then no charge made against defendant Clifford H. Davis, based on reasonable grounds, or otherwise, that Clifford H. Davis had committed a felony. That the only information the said Jesse M. Ash had at said time was derived from a

telephone conversation with an unknown party; said unknown party allegedly having gained information based on radio information, and this did not constitute reasonable cause for making arrest of this defendant, Clifford H. Davis.

That the initial arrest and apprehension of this defendant, Clifford H. Davis, being illegal and in violation of the 4th and 14th Amendment to the Constitution of the United States, and he having been held in violation of his constitutional and due process rights, all subsequent information, evidence, testimony accumulative and secured being tainted and in violation of due process could not and cannot be used against said defendant Clifford H. Davis. That upon information and belief, defendant alleges that the basis of the indictment against this defendant, Clifford H. Davis, grows entirely subsequent to and as a result of the said illegal and unauthorized arrest.

WHEREFORE, defendant Clifford H. Davis, says respectfully that said indictment should be set aside and quashed and defendant, Clifford H. Davis, discharged in the premises.

Respectfully submitted,

/s/

Attorney for Clifford H. Davis

I, Paul M. Moore, Attorney for defendant Clifford H. Davis, do hereby certify that I have this day mailed a true copy of the attached and foregoing motion to Honorable H. M. Ray, United States Attorney, postage prepaid, United States Mail, at his address of Oxford, Mississippi 38655.

This the —— day of March, 1968.

/s/

Attorney for Clifford H. Davis

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-2547
Summary Calendar *

CLIFFORD H. DAVIS,
PETITIONER-APPELLANT,

versus

UNITED STATES OF AMERICA,
RESPONDENT-APPELLEE.

Appeal from the United States District Court for the Northern District of Mississippi

(January 20, 1972)

Before BELL, AINSWORTH and GODBOLD,
Circuit Judges.

PER CURIAM: Clifford H. Davis appeals from the denial by the District Court of his motion to vacate sentence pursuant to 18 U.S.C. § 2255. We affirm.

Appellant was indicted by a federal grand jury sitting in Greenville, Mississippi, on January 30, 1968, for bank robbery in violation of 18 U.S.C. § 2113(a). He was tried by a jury, convicted and sentenced to serve fourteen years. We affirmed on direct appeal. See *Davis v. United States*, 5 Cir., 1969, 409 F. 2d 1095.

Appellant, a Negro, alleges for the first time in his 2255 petition that his sentence should be set aside on grounds of systematic exclusion of Negroes from the grand jury which

* Rule 18, 5 Cir.; see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5 Cir., 1970, 431 F. 2d 409, Part I.

indicted him. The District Court correctly found that appellant's failure to raise the objection timely by pretrial motion, pursuant to Rule 12(b)(2), Fed. R. Crim. P., constituted a waiver of that objection, and in the absence of any extraordinary or prejudicial circumstances, appellant was not entitled to the relief sought. See *Shotwell Manufacturing Co. v. United States*, 371 U.S. 341, 83 S.Ct. 448 (1963); *Pinkney v. United States*, 5 Cir., 1967, 380 F. 2d 882; *Jackson v. United States*, 5 Cir., 1968, 394 F.2d 114; *Brooks v. United States*, 5 Cir., 1969, 416 F. 2d 1044; *Bustillo v. United States*, 5 Cir., 1970, 421 F. 2d 131; *Throgmartin v. United States*, 5 Cir., 1970, 424 F.2d 630.

There is no merit to appellant's additional contention that his constitutional rights were infringed because an assistant to his counsel, a senior law school student, was not allowed to confer with him in prison.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1971

No. 71-2547
Summary Calendar

D. C. Docket No. CA-WC-71-2

CLIFFORD H. DAVIS,
PETITIONER-APPELLANT,

versus

UNITED STATES OF AMERICA,
RESPONDENT-APPELLEE.

Appeal from the United States District Court for the Northern District of Mississippi

Before BELL, AINSWORTH and GODBOLD, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Mississippi, and was taken under submission by the Court upon the record and briefs on file, pursuant to rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be, and the same is hereby, affirmed.

January 20, 1972
Issued As Mandate: Mar. 6, 1972

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-2547

CLIFFORD H. DAVIS,
PETITIONER-APPELLANT,

versus

UNITED STATES OF AMERICA,
RESPONDENT-APPELLEE.

Appeal from the United States District Court for the Northern District of Mississippi

(February 25, 1972)

ON PETITION FOR REHEARING

Before BELL, AINSWORTH and GODBOLD, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and number cause be and the same is hereby DENIED.[1]

[1] We have considered appellant's contention on petition for rehearing that an original file was missing and it was "therefore utterly impossible for the Court to obtain or read a mystical file in its entirely (sic) between January 1971, and May 1971, when they were lost in its entirety in June 1968." He maintains, therefore, that the District Judge was in error in rejecting his contention that an oral motion was made by counsel on his behalf challenging the array of the Grand Jury ten minutes prior to jury trial. We have difficulty understanding appellant's contention. Nevertheless, we have carefully examined all of the files, record and supplementary records, as well as the transcript of testimony in this matter. There is no mention therein of a motion, oral or written, challenging the Grand Jury array. The contention is raised for the first time, in this Section 2255 proceeding. The files show that subsequent to the denial by the District Court of the Section 2255 petition and subsequent to Davis' appeal therefrom, the United States Attorney was granted

leave to modify the record on appeal by filing true copies of original motions by Davis for a new trial and to quash indictment because of alleged illegality of arrest, which original motions were missing from the file. Neither motion refers in any way to the composition of the Grand Jury. These instruments were before the District Judge and considered by him in denying the writ as shown by the following excerpt from his memorandum opinion:

"Petitioner claims that an objection to the composition of the grand jury was made by oral motion of petitioner's attorney and denied by the court before trial in open court on May 6, 1968, the day on which petitioner's trial commenced. He contends, therefore, that there could be no waiver under Rule 12(b)(2) since a proper motion was made before trial. The Court recalls no such oral motion having been made. In order to avoid any possible oversight injurious to the rights of petitioner, the court has read in full the transcript of the proceedings at every stage of petitioner's prosecution and has read the entire jacket file, including docket entries. These voluminous records reveal that not the slightest reference was made to the composition of the grand jury either by petitioner or by his attorney at any stage of the proceedings. Petitioner's attorney did file, on March 6, 1968, a motion to quash the indictment on the ground that the arrest of petitioner was illegal, and that the indictment of the grand jury based upon evidence obtained pursuant to such alleged illegal arrest was void. No reference was made in that motion to the composition of the grand jury. The motion to quash was denied by the court prior to the commencement of trial on May 6, 1968. The substance of that motion was also the substance of the appeal to the Fifth Circuit. *Davis v. United States*, supra. Moreover, petitioner was present at his arraignment on March 21, 1968, at which time his attorney requested and was allowed a period of thirty days within which to file additional pretrial motions. See Rule 12(b)(3) FRCrP. The transcript also reveals that petitioner was present when the motion to quash the indictment on the ground of the alleged illegal arrest was submitted to and denied by the court. The court finds, therefore, that petitioner did not object to the composition of the grand jury prior to trial and did not raise such an objection at any other stage of the proceedings, including his trial, motion for new trial, appeal, nor in his various post conviction motions, until the filing of the petition now before the court."

The contentions of appellant are without merit.

SUPREME COURT OF THE UNITED STATES

No. 71-6481

CLIFFORD H. DAVIS,
PETITIONER,

v.

UNITED STATES

On petition for writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

On consideration *of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.*

OCTOBER 10, 1972

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-6481

CLIFFORD H. DAVIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 72-95

LEWIS S. TOLLETT, Warden,

Petitioner,

v.

WILLIE LEE HENDERSON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AS *AMICUS CURIAE*

JACK GREENBERG
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CHARLES STEPHEN RALSTON
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Attorneys for the NAACP Legal Defense and Educational Fund, Inc., as Amicus Curiae

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Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
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No. 72-95

LEWIS S. TOLLETT, Warden,

Petitioner,

v.

WILLIE LEE HENDERSON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AS *AMICUS CURIAE*

Interest of Amicus*

The NAACP Legal Defense and Educational Fund, Inc., is a non-profit corporation, incorporated under the laws of the State of New York in 1939. It was formed to assist Negroes to secure their constitutional rights by the prosecution of lawsuits. Its charter declares that its purposes include rendering legal aid gratuitously to Negroes suffering injustice by reason of race who are unable, on account of poverty, to employ legal counsel on their own behalf. The charter was approved by a New York Court, authorizing the organization to serve as a legal aid society. The NAACP Legal Defense and Educational Fund, Inc. (LDF), is independent of other organizations and is supported by contributions from the public. For many years its attorneys have represented parties in this Court and the lower courts, and it has participated as *amicus curiae* in this Court and other courts, in cases involving many facets of the law.

Over a long period of time, LDF attorneys have handled, here and in other courts, many cases involving the unconstitutional exclusion of blacks from jury venires.** Throughout this period, LDF has handled many jury discrimination cases in which our help has been sought only after blacks have been convicted and in which the issue was not raised at trial by their then counsel. This experience has demonstrated to us the vital importance of the availability of federal post-conviction remedies as often the only

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* Letters of consent from counsel for the petitioners and the respondents in both of these cases have been filed with the Clerk of the Court.

** *E.g., Patton* v. *Mississippi*, 332 U.S. 463 (1947); *Sims* v. *Georgia*, 389 U.S. 404 (1967); *Carter* v. *Jury Commission of Greene County*, 396 U.S. 320 (1970); *Turner* v. *Fouche*, 396 U.S. 346 (1970); *Alexander* v. *Louisiana*, 405 U.S. 625 (1972).

available mode to vindicate the most blatant violations of a fundamental right. Therefore, LDF has a particular interest in the outcome of these cases since they raise serious questions as to the continued vitality of both habeas corpus and motions under 28 U.S.C. § 2255 as vehicles by which LDF may carry out its purpose.

Summary of Argument

I.

This Court has held, in a consistent line of cases from *Johnson* v. *Zerbst*, 304 U.S. 458 (1938), through *Fay* v. *Noia*, 372 U.S. 391 (1963) and *Sanders* v. *United States*, 373 U.S. 1 (1963), to *Humphrey* v. *Cady*, 405 U.S. 504 (1972), that a waiver of fundamental constitutional rights can not be presumed from a procedural default. Rather, in a proceeding for post-conviction relief, a federal court can bar relief on the basis of waiver only upon a finding that the defendant himself made a deliberate and understanding decision not to raise the issue at trial.

II.

These principles apply with full force to claims of jury discrimination arising under the Constitution. In neither of the two cases before the Court has such a deliberate choice on the part of the defendant not to raise a challenge to the indictment on grounds of racial discrimination been demonstrated.

III.

Strong considerations of public policy militate against the imposition of any rule of forfeiture that would bar black defendants from obtaining post-conviction relief from un-

constitutional jury selection procedures. Lower federal courts have recognized that failure of defense counsel, without acquiescence by defendants, to raise this issue cannot constitute waiver. Any other holding would result in the undermining of 90 years of efforts of this Court to protect the rights of black defendants indicted and convicted by a white-dominated system of justice.

ARGUMENT

These two cases present to the Court the question whether the rule regarding waiver established by *Johnson* v. *Zerbst*, 304 U.S. 458 (1938), and reiterated in *Fay* v. *Noia*, 372 U.S. 391 (1963), apply in cases raising the claim that blacks have been excluded from grand juries in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States. Thus, they involve, in the context of both federal and state prosecutions, the standards by which a federal court on collateral relief should determine whether there has been an effective waiver of the right to object to the denial of this fundamental constitutional right by failure to comply with procedural rules as to when such a challenge should be made. In *Davis* v. *United States*, No. 71-6481, the issue is whether the simple failure to comply with Rule 12(b)(2) of the Federal Rules of Criminal Procedure in and of itself constitutes a waiver barring relief in a 28 U.S.C. § 2255 proceeding. *Tollett* v. *Henderson*, No. 72-95, involves the question as to whether the failure to comply with a similar Tennessee court rule also militates against a defendant being able to raise the claim on habeas corpus brought pursuant to 28 U.S.C. § 2254.

Despite the fact that one case is a federal and the other is a state prosecution, *amicus* urges that both are governed by the rule laid down in *Johnson* v. *Zerbst*, *supra*, that

"'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights" and that they "'do not presume acquiescence in the loss of fundamental rights.' A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege." 304 U.S. at 464.

I

The Requirements for Finding a Waiver of a Fundamental Constitutional Right in Both State and Federal Courts Require an Affirmative Showing That the Defendant Himself Acquiesced in Their Non-Assertion.

Johnson v. *Zerbst* itself was a collateral attack on a federal conviction, the issue being whether the defendant had waived his right to representation by counsel guaranteed by the Sixth Amendment to the Constitution of the United States. The lower courts had essentially held that the procedural default of the defendant in failing to request appointment of counsel at trial barred relief in the collateral proceeding. This Court unequivocally rejected such a view. Rather, it held that in any case the question was whether there had been "an intelligent waiver" of the right involved and that that finding could be made only after an examination of the particular facts and circumstances surrounding the case demonstrated that the defendant affirmatively decided to forego the right in question. Thus, the mere failure affirmatively to assert the right was not enough to bar collateral relief. 304 U.S. at 464.

The *Johnson* rule was reaffirmed in the strongest possible terms in *Fay* v. *Noia, supra,* which involved a state prosecution, and which held that in a proceeding for col-

lateral relief in federal court, waiver could not be presumed by failure to pursue or follow a particular rule of procedure. To follow such a rule of forfeiture would be to "introduce legal fictions into federal habeas corpus."[1] Thus, the inquiry required by a federal court is to determine:

> If a habeas applicant, after consultation with competent counsel or otherwise, understandingly and knowingly forwent the privilege of seeking to vindicate his federal claims in the state courts, whether for strategic, tactical, or any other reasons that can fairly be described as a deliberate bypassing of state procedures. . . .
> 372 U.S. at 439.

Then, and only then, "it is open to the federal court on habeas to deny him all relief." *Ibid.* The court reemphasized that the standard required "the considered choice of the petitioner. . . . A choice made by counsel not participated in by the petitioner does not automatically bar relief."

Shortly after the decision in *Fay*, this Court completed the circle by making it clear that the *Fay* standards applied equally in a 28 U.S.C. § 2255 proceeding. *Sanders* v. *United States*, 373 U.S. 1, 18 (1963). And see, *Kaufman* v. *United States*, 394 U.S. 217, 228 (1969). As recently as last term, this Court, by a unanimous seven-member panel, reaffirmed that the requirements of *Johnson* and *Fay* were still the law and stated: "If the District Court cannot find persuasive evidence of a knowing and intel-

[1] As the Fifth Circuit has put it, in a case involving jury discrimination: "The 'waiver' asserted in this case is simply a diaphanous euphemism for forfeiture of rights resulting from a procedural default." *Labat* v. *Bennett*, 365 F.2d 698, 707 (5th Cir. 1966).

ligent waiver on the part of petitioner himself, then the Court should proceed to consider petitioner's constitutional claims." Therefore, a defendant "is not necessarily bound by the decision or default of his counsel." *Humphrey* v. *Cady*, 405 U.S. 504, 517 (1972).

II

The *Johnson-Fay* Requirements Apply With Full Force to Jury Discrimination Claims in Both State and Federal Courts.

We have set out above the general rule for determining whether there has been a waiver of a fundamental constitutional right. In its terms, the *Johnson-Fay* rule applies to all such rights without exception,[2] and it has in fact been applied in a variety of circumstances. See, *e.g.*, *Jackson* v. *Denno*, 378 U.S. 368, 370 n. 1 (1964) (challenge to procedural rules governing admission of confessions; the *Fay* rule provides "the *only* ground for which relief may be denied in federal habeas corpus for failure to raise a federal constitutional claim in the state courts" (emphasis added)); *Henry* v. *Mississippi*, 379 U.S. 443, 450 (1965) (objection to unconstitutionally seized evidence); *Humphrey* v. *Cady*, *supra* (objection to procedures for commitment as a sex crime offender).

It is clear that the same principle also must apply in cases involving the right to object to discrimination in the selection of juries. It is no overstatement to assert that perhaps no other constitutional right has been recog-

[2] "Nothing in *Fay* v. *Noia* suggests that the Supreme Court intended to establish a hierarchy of constitutional protections and limit the applicability of the classic definition of waiver to those rights occupying the highest positions." *Henderson* v. *Tollett*, 459 F.2d 237, 239 (6th Cir. 1972).

nized by this Court for so long as being absolutely fundamental to the requirements of due process and equal protection. From *Strauder* v. *West Virginia*, 100 U.S. 303 (1880) through *Alexander* v. *Louisiana*, 405 U.S. 625 (1972), this Court has held repeatedly that racial discrimination in the selection of juries violates the most fundamental right to be tried by a system of justice free of racial bias. See also, *Patton* v. *Mississippi*, 332 U.S. 463 (1947), and cases cited at 465 n. 3. The right fully encompasses indictment by grand jury, *Alexander* v. *Louisiana*, 405 U.S. at 626 n. 3.

The applicability of *Johnson* and *Fay* has been duly recognized by federal courts when faced with questions of jury discrimination by states in violation of the Fourteenth Amendment. Indeed, the circuit courts have been unanimous in holding that the right is of the fundamental character contemplated by *Johnson*, and that therefore the failure to comply with state procedural rules will not in and of itself result in a waiver of the right to object to discrimination. Rather, the burden is on the state to demonstrate by affirmative evidence that the decision not to challenge the composition of either the grand or petit jury was deliberately made by the defendant himself with full understanding of the consequences thereof, free from any countervailing coercive pressures. See, *e.g.*, *Wade* v. *Yeager*, 377 F.2d 841 (3rd Cir. 1967); *McNeil* v. *North Carolina*, 368 F.2d 313 (4th Cir. 1966); *Whitus* v. *Balkcom*, 333 F.2d 496 (5th Cir. 1964); *Henderson* v. *Tollett*, 459 F.2d 237 (6th Cir. 1972); *Carmical* v. *Craven*, 457 F.2d 582 (9th Cir. 1971).

We urge, therefore, that the Sixth Circuit in *Tollett* was correct in its refusal to impose a rule of forfeiture, particularly in view of the facts of the case. Both the district court and the court of appeals conducted precisely the inquiry required by *Johnson*, *Fay*, and *Humphrey*. They

found that not only the petitioner, but his counsel were unaware of even the possibility of challenging the composition of the grand jury, and that the idea would not have occurred to *any* Tennessee lawyer at the time. Therefore, there was clearly no decision at all on the matter, let alone one made for tactical reasons.[3]

None of the State's grounds for escaping the application of *Johnson* and *Fay* are persuasive. The argument that the jury selection methods used in 1948 were not unconstitutional under the prevailing law at the time is simply wrong. No blacks ever served on a grand jury in the history of the county until 1953, five years after Henderson's indictment, in a county more than 25% black. This was precisely the kind of facts held to establish a *prima facie* case of jury discrimination in *Norris* v. *Alabama*, 294 U.S. 587 (1935), and *Neal* v. *Delaware*, 103 U.S. 370 (1881), decided thirteen and sixty-seven years, respectively, before the indictment was handed down in this case.

The argument that Henderson's counsel may not have raised the issue because he decided it would be futile to do so because of recent decisions of the Tennessee Supreme Court is not supported by the record. To the contrary, it

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[3] Indeed, with one exception, it is difficult to imagine *any* constitutionally acceptable tactical reason for not challenging racial discrimination in the composition of juries. Fear of arousing hostility in the white community on the part of counsel is not, of course, an acceptable reason for not making a challenge, see *Whitus* v. *Balkcom*, 333 F.2d 496 (5th Cir. 1964), *cf.*, *Fay* v. *Noia*, 372 U.S. at 439-440, despite the State of Tennessee's assertions to the contrary here (Brief for Petitioner in No. 72-95, p. 6). The one exception would be a case where counsel and the defendant deliberately decided not to object to the array on the hope of getting a second opportunity to contest a conviction if an appeal on other grounds failed. Such a state of facts might well amount to an abuse of the remedy of habeas corpus or 2255 within the meaning of *Sanders* v. *United States*, 373 U.S. 1, 9-11 (1963). In neither of the two cases before the court was such an abuse either pleaded or proven.

simply never occurred to counsel that any such claim existed.[4]

Finally, the fact that Henderson pleaded guilty to the crime charged does not put him in a different position *vis-a-vis* his right to challenge his indictment than a defendant who has gone to trial. This Court has repeatedly held that the right to challenge an unconstitutional grand jury is independent of the right to challenge the petit jury, and that the same principles apply to each. See, *Alexander* v. *Louisiana*, 405 U.S. at 626, n. 3. Thus, it has rejected the position that discrimination in the selection of the grand jury is of no moment since an indictment is not a conviction and any defect is cured by trial before a constitutionally acceptable petit jury. *Pierre* v. *Louisiana*, 306 U.S. 354 (1939). See also, *Hill* v. *Texas*, 316 U.S. 400, 406 (1942). No more than does a judgment of guilty by a jury, after a full trial (see, *Cassell* v. *Texas*, 339 U.S. 282 (1950), does a plea of guilty wipe out the action of an unconstitutional grand jury.[5]

Furthermore, it cannot be maintained that the plea of guilty itself operated as a waiver of all objections to constitutional infirmities in the proceeding. Such a contention

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[4] Even if supported by the evidence, the argument proves too much. Surely, counsel's decision, not acquiesced in by the defendant, not to raise a valid issue because he thought it could not be won, is not a decision made by the defendant with knowledge of what he is surrendering as contemplated by *Johnson* and *Fay*.

[5] If anything, the opposite should be the case. If in fact a defendant has had a trial before a constitutionally adequate petit jury it would be at least appear that there is not the kind of abrogation of Fourteenth Amendment rights of black defendants by the entire judicial system. This court has indicated that particular attention must be given to guilty plea cases to ensure that there has been no violation of constitutional rights, precisely because the defendant has given up the procedural protections inherent in a jury trial. See, *Boykin* v. *Alabama*, 395 U.S. 238, 242-44 (1969); *Rice* v. *Olson*, 324 U.S. 786 (1945).

was specifically rejected by this Court in *Rice* v. *Olson*, 324 U.S. 786 (1945). There, the Court rejected the position that when a defendant pleads guilty it can be presumed that he "'absolutely' and finally" waived his right to be represented by counsel. 324 U.S. at 788. It was noted that the holding of the state court was based on the proposition that such a plea "'operates as a waiver of any defense, and . . . with it, of course, the constitutional guarantees with respect to the conduct of criminal prosecutions.'" *Id.*, n. 2.

This Court held to the contrary, pointing out that such a presumption could not be maintained in the face of an allegation by the defendant in his petition for collateral relief that he did *not* waive the right in question. That allegation "squarely raised a question of fact" that could not be resolved by any presumption drawn from the bare fact of a guilty plea. Rather, it must be "determined by evidence" going to the issue, *inter alia*, of whether the defendant waived his right "intelligently and understandingly." *Id.* at 788-789. See also, *Carnley* v. *Cochran*, 369 U.S. 506, 515-516 (1962); *Boykin* v. *Alabama*, 395 U.S. 238 (1969).

In *Tollett*, of course, the precise issue is whether Henderson "intelligently and understandingly" gave up his right to challenge the composition of the grand jury. No more than was the case in *Rice* v. *Olson* can that question be resolved by reliance on a presumption attaching to a plea of guilty. Rather, the courts below made the inquiry mandated by *Rice* and determined on the basis of the evidence that no understanding waiver had been made. *Winters* v. *Cook*, 466 F.2d 1393 (5th Cir. 1972).

In summarizing our position with regard to *Tollett*, we urge that the courts of appeals have been correct in deciding waiver questions pursuant to the standards estab-

lished in *Johnson* and *Fay*. This court should therefore affirm the Sixth Circuit's decision, and uphold the courts of appeals' approach in cases raising the issue of the availability of habeas corpus relief in state jury discrimination cases.

Paradoxically, in cases involving *federal* prosecutions, where relief under § 2255 is sought on the basis of jury discrimination, the lower courts have been much less consistent in applying the standards of *Johnson* and *Fay*. The Fifth Circuit in particular, which has been diligent in protecting the rights of *state* prisoners from the application of a strict rule of waiver for non-compliance with procedural rules, has, on the other hand, rigidly applied a rule of forfeiture in federal prosecutions regardless of the circumstances. Thus, in the *Davis* case the court, relying on a series of earlier decisions, held simply that failure to comply with Rule 12(b)(2) of the Federal Rules of Criminal Procedure, operated as an automatice forfeiture of the right of a black defendant to object *on constitutional grounds* to the exclusion of blacks from the grand jury that indicted him.

Amicus urges that there is no basis in law or reason for this inconsistent result, but that it flies in the face of this Court's decisions from *Johnson* through *Humphrey*. The Fifth Circuit has mechanically applied the decision in *Shotwell Manufacturing Co.* v. *United States*, 371 U.S. 341 (1963), to all instances where a federal defendant has not challenged his jury prior to the time of trial, and we contend that this automatic reliance on *Shotwell* is misplaced and that that case is distinguishable.

In *Shotwell*, corporate defendants raised a question as to the legality of the composition of the jury on the appeal itself some years after the original trial. The grounds for

the challenge in *Shotwell* were based on alleged violations of the federal jury statutes and the defendants relied upon this Court's supervisory power over the administration of those statutes in the lower federal courts. See, *Ballard* v. *United States,* 329 U.S. 187 (1946). The claim was apparently not made that members of the defendants' own class were excluded from jury service, but that, because of improper administrative action, the statutes' requirement that a cross-section of the community be empanelled was not met. Thus, under the law prevailing at the time, the claim made in *Shotwell* was evidently not viewed by this Court as one of constitutional dimension.[6] Similarly, the cases cited with approval in *Shotwell,* 371 U.S. at 362, all deal with challenges based on violations of federal statutory rights as declared by this Court in cases such as *Ballard* v. *United States, supra,* and *Thiel* v. *Southern Pacific Company,* 328 U.S. 217 (1946).[7]

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[6] We do not wish to imply by this discussion of *Shotwell* and the cases it relied upon that we do not believe that there is a right guaranteed by the Constitution to a jury that represents a reasonable cross-section of the community. See, *Carter* v. *Jury Commission,* 396 U.S. 320, 330 (1970). Indeed, our contention would be to the contrary if these cases raised that issue, and we have urged that position before this Court in *Alexander* v. *Louisiana, supra.* The point here, however, is that that proposition was not firmly established at the time of *Shotwell.* See, *Fay* v. *New York,* 332 U.S. 261 (1947).

[7] The cases cited with approval in *Shotwell,* 371 U.S. at 362, all raised claims of statutory violations, and evidently did not urge constitutional ones that were deemed to be substantial. *E.g., Frazier* v. *United States,* 335 U.S. 497 (1948) and *Higgins* v. *United States,* 160 F.2d 222 (D.C. Cir. 1946) challenged juries composed largely of government employees. *Hanratty* v. *United States,* 218 F.2d 358 (5th Cir. 1955) and *Miranda* v. *United States,* 255 F.2d 9 (1st Cir. 1958) challenged the exclusion of women. In *Scales* v. *United States,* 367 U.S. 203 (1961), the challenge was based on procedures alleged to be inconsistent with the statutes; although Rule 12(b)(2) was referred to, the trial court, the Court of Appeals, and this Court all also rejected the claim on the merits. *Id.* at 259.

Thus, this Court in *Shotwell* was not presented with a case raising the question of whether the *Johnson* standard of waiver applied in a collateral proceeding by a black defendant seeking to challange jury discrimination on constitutional grounds arising from the exclusion of blacks from juries. Therefore, it is not surprising that the same court that decided *Fay* two months later and that in the same term held in *Sanders* v. *United States*, 373 U.S. 1 (1963) that the *Johnson-Fay* standards applied in federal collateral proceedings, did not discuss the applicability of *Johnson* v. *Zerbst* in *Shotwell*. For if *Shotwell* and Rule 12(b)(2) are read the Fifth Circuit's way, as creating a rule of forfeiture, they are clearly in conflict with *Johnson*, *Fay* and *Sanders*.

Sanders involved the standards for deciding whether a defendant was barred from raising a constitutional claim in a second § 2255 petition that might have been raised in an earlier one. The district court applied what was essentially a rule of forfeiture, and held that the failure to raise the issue at the earlier opportunity operated as a bar. Such a ruling is precisely analogous to the Fifth Circuit's position that a failure to comply with Rule 12(b)(2) operates as a similar bar. This Court in *Sanders* rejected such a rule, and applied the *Fay* holding that a deliberate decision on the part of the defendant not to raise the issue for a tactical or other reason must be shown. Thus, the Ninth Circuit correctly recognized that *Sanders* controlled in its holding that a failure to comply with 12(b)(2) did not operate as an automatic forfeiture of the right to challenge jury discrimination. *Fernandez* v. *Meier*, 408 F.2d 974 (9th Cir. 1969).

The same ground we have discussed for distinguishing *Shotwell* also leads to a conclusion that 12(b)(2) does not conflict with *Johnson* and *Fay*. The rule by its terms allows

a court to find no waiver "for cause shown." That language must be read in conformity with the *Johnson-Fay* rule to mean that sufficient cause is established by: (1) the assertion of a constitutional challenge to the grand jury; and (2) the determination by the court that the defendant himself did not participate "knowingly and understandingly" in a deliberate decision not to raise the issue before trial. Thus, whatever the validity of a rule that would require that ordinarily *statutory* challenges to a grand jury be made pursuant to 12(b),[3] challenges on constitutional grounds must be subject to a different standard.

The Fifth Circuit apparently gave no consideration to this distinction in *Davis*, for his motion filed under § 2255 specifically challenges his grand jury "as being an unconstitutional array" since it did not meet the requirements of "the Fifth Amendment of the United States Constitution" as well as those of the federal jury statutes, 28 U.S.C. §§ 1861-1864. Thus, the Fifth Circuit has adopted precisely the rule rejected by this Court in *Johnson* v. *Zerbst*, and its reliance on *Shotwell* and its reference to Rule 12(b) amounts to a holding that the simple failure to comply

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[3] We note in passing that the 1968 Amendments to the federal jury statutes seem to recognize the distinction between a challenge based on noncompliance with the statutes and challenges based on other grounds and the procedural requirements for mounting such a challenge. 28 U.S.C. § 1867 sets forth the required procedure for challenging noncompliance with sections 1861-1864 and requires that such challenges be made before the *voir dire* examination begins or earlier if the noncompliance was or could have been discovered. Section 1867(e) states that "the procedures prescribed by this section shall be the exclusive means by which a person accused of a Federal crime . . . may challenge any jury on the ground that such jury was not selected in conformity with the provisions of this title." The section then goes on to state that it does not preclude the pursuit of other remedies to vindicate any other law, including the Fifth Amendment to the Constitution, prohibiting racial discrimination in the selection of juries.

with that rule in and of itself constitutes a waiver of the constitutional right involved.

It is clear that the lower courts did *not* make the inquiry or find the facts required by *Johnson, Fay* and *Sanders*. The district court placed the burden *on the defendant* to prove somehow that he was not aware of his constitutional rights, and presumed that because of his present legal knowledge and the fact that he had a capable lawyer, he must have known of them. Such a presumption stands *Johnson* on its head, and is, of course, improper. See, *Glasser* v. *United States*, 315 U.S. 60, 70-72 (1942), holding that an *assistant United States attorney* could not be presumed to know of his right to be represented by independent counsel and to have waived it by inaction.

Finally, the lower court's holdings that some special prejudice must be shown in a racial exclusion case in order to escape the requirements of 12(b)(2) cannot be sustained. Whatever may be the validity of that part of the *Shotwell* holding as it relates to the right of persons not of the excluded class to challenge noncompliance with the federal jury statutes, it cannot be the rule in the case of a black defendant challenging the unconstitutional exclusion of blacks.

Indeed, it is clear that a defendant of any race can challenge the exclusion of blacks without any showing of particularized prejudice to him, *Peters* v. *Kiff*, 407 U.S. 493 (1972). In *Peters*, this Court rejected, in the context of a state prosecution, the argument that a white defendant had to show such prejudice because he had not challenged the exclusion of blacks from his jury until he sought collateral relief. The Court held that the fundamental impossibility of demonstrating such prejudice made it unfair to place such a burden on the defendant in a situation where the state was responsible for the continuation of practices that were unconstitutional.

III

Any Rule Imposing an Automatic Forfeiture for Failure to Comply With Rules of Procedure Is Particularly Inappropriate in Jury Discrimination Cases.

In parts I and II, of this brief, we have set out the general rule regarding the waiver of constitutional rights and have explained why it applies to jury discrimination cases under the rationale of *Johnson* and *Fay* since they involve a fundamental constitutional right as contemplated by those decisions. Here we urge that other considerations peculiar to the problems raised by racial discrimination in the selection of juries dictate that as a matter of policy a strict rule of forfeiture may not be permitted. This is because jury discrimination by its nature has been a systematic, institutionalized defect in the administration of justice in this country, despite 90 years of pronouncements by this Court.

Amicus has a special concern with the problem of racial discrimination in the selection of both grand and petit juries, not only in the South but throughout the United States. In our statement of interest, *supra*, we have noted a long-standing involvement in jury discrimination problems in cases before not only this Court but in lower courts, both state and federal. Because of our experience, we are often contacted by black prisoners who wish assistance in challenging their indictments or convictions because of such discrimination. These requests for help show a consistent pattern which is typified by the two cases before the Court.

A black defendant, without resources and with little knowledge of his legal rights at the beginning of his prosecution, is represented by either retained or court-appointed

counsel, usually white. He is indicted and goes to trial, at which point he may for the first time realize that he is faced with an all or virtually all-white jury array. Of course, he has had no way of knowing the racial composition of the grand jury that indicted him. In most instances, his counsel does not mount a challenge to the jury system as it relates either to the grand or petit jury and the black defendant becomes aware of his right to do so only after he has been convicted and incarcerated and subsequently becomes more acquainted with his legal rights.

The reasons why jury discrimination challenges have not been made more often, despite the evident fact that they could have been in virtually every prosecution brought in southern states and in a substantial portion of those brought in northern states, are not difficult to ascertain. The number of black lawyers and white lawyers cognizant of civil rights issues, those who would be most apt to be concerned about the problem, has been and remains small, particularly in southern states. See, *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 443 (1963), *Sanders* v. *Russell*, 401 F.2d 241 (5th Cir. 1968), *Sobol* v. *Perez*, 289 F.Supp. 392 (E.D. La. 1968).

Thus, black defendants are in the main represented in the first instance by white attorneys whose main experience is with representing white clients. Unfortunately, these lawyers simply do not raise jury discrimination issues in the large run of cases. In the northern states, and now in some southern states, this may be because of the failure to recognize that there in fact may be a problem. This is not surprising because the typical northern situation involves not so much the kind of deliberate discrimination typical of many southern jurisdictions, but rather the use of various devices that have the effect of excluding black jurors. See, *Carmical* v. *Craven*, 457 F.2d 582 (9th Cir. 1971),

Smith v. *Yeager*, 465 F.2d 272 (3rd Cir. 1972). With few exceptions, it has only been in recent years that such practices have come to light and their constitutional significance has been recognized.

The same pattern, we believe, also explains the relatively few challenges on racial exclusion grounds to jury selection methods in federal courts. The pattern there again has not been by and large deliberate exclusion of blacks but rather the utilization of selection methods, such as the key-man system, which, however inadvertently, have had the effect of excluding blacks. See, *Rabinowitz* v. *United States*, 366 F.2d 34 (5th Cir. 1966). In *Davis* v. *United States*, of course, precisely such a contention, together with allegations of deliberate exclusion, was made.[9]

In southern jurisdictions ignorance of the possibility of challenging grand and petit juries has in the past, unfortunately, been coupled with the deliberate neglect or tacit acquiescence of white attorneys in the maintenance of an exclusionary jury system. *Tollett* v. *Henderson* presents a vivid example of such a case. Counsel who represented Henderson in Tennessee in 1948 frankly admitted that it simply never occurred to him to challenge racial discrimination in the jury selection system. Similarly, Judge Galbreath of the Court of Criminal Appeals of Tennessee, in his concurring opinion in respondent's collateral proceeding in that court, stated:

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[9] Congress itself has long grappled with problems arising from the racially exclusionary effects of key-man and similar systems in the federal courts. The result of this concern was the passage of the 1968 Jury Selection Act, 28 U.S.C. § 1861 et seq., which sets up a random system of selection from sources which are designed to produce as full a cross-section of the community as possible. With the implementation of this act, jury discrimination problems in the federal courts have, with a few exceptions, been largely eliminated. Petitioner Davis, of course, was indicted and tried prior to the effective date of the 1968 reform.

> No lawyer in this State would have ever thought of objecting to the fact that Negroes did not serve on the Grand Jury in Tennessee in 1948, just as scarcely anyone objected to the complete segregation of all public and private facilities of any kind in the State until the next decade. 459 S.W.2d 176, 179-180.

Similarly, the Fifth Circuit has taken judicial notice of the fact that white lawyers simply would not raise the issue because of ignorance of the issue, because of fear of raising hostility in the community, or because of acquiescence in the system. See, *United States ex rel. Goldsby* v. *Harpole,* 263 F.2d 71, 82-83 (5th Cir. 1959); *United States ex rel. Seals* v. *Wiman,* 304 F.2d 53, 68-69 (5th Cir. 1962); *Whitus* v. *Balkcom,* 333 F.2d 496 (5th Cir. 1964); *Cobb* v. *Balkcom,* 339 F.2d 95 (5th Cir. 1964); *Winters* v. *Cook,* 466 F.2d 1393 (5th Cir. 1972).

In light of these realities, a rule that essentially operates as a forfeiture of the right to challenge discrimination in the selection of grand, and presumably petit, juries would mean that blacks would be condemned to remain in prison without recourse even though they were indicted and convicted under procedures blatantly unconstitutional, adhered to in the face of decisions of this Court going back to 1880. These defendants would be placed in this situation through no fault of their own but simply because of defense counsel's essential acquiescence in the system, or their ignorance of the possibility of challenging it.

Thus, these cases concern a fundamental and institutionalized defect in the system of justice that simply cannot be compared to, for example, a decision in a particular case to forego challenging evidence as unconstitutionally seized, or a statement as unconstitutionally coerced. It would be unconscionable to place the burden of the legal

profession's failure to attack this problem on the shoulders of the very persons that this Court has been endeavoring to protect for 92 years.

These considerations also require that the prosecution's claim of an interest in the finality of criminal convictions be rejected. The problem of jury discrimination is one peculiarly within the state's power to correct. It is not a question of the malfeasance or mistake of one police officer in seizing evidence, or of an interrogator or prosecutor overstepping the bounds set by the Constitution in obtaining a confession, on a single judge making an erroneous decision as to a constitutional question arising from the particular facts of a particular case. Rather, an entire system has been maintained with full knowledge of its unconstitutionality, with the active participation of all elements of the very institutions supposed to be on the side of justice, including judges, district attorneys, court personnel, and, unfortunately, in many cases defense counsel. The institutions of government have chosen to violate the Constitution of the United States, not in one individual case, but in every case involving every defendant brought before it. If any party has waived or forfeited its right to insist on a particular interest it is the government itself, and this Court should ensure that all persons convicted under unconstitutional systems of jury selection be able to gain relief, unless they themselves, with full knowledge of the consequences, deliberately chose to forego their rights.

CONCLUSION

For the foregoing reasons, the decision in No. 71-6481 should be reversed and that in No. 72-95 affirmed.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 71-6481

CLIFFORD H. DAVIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

BRIEF FOR PETITIONER

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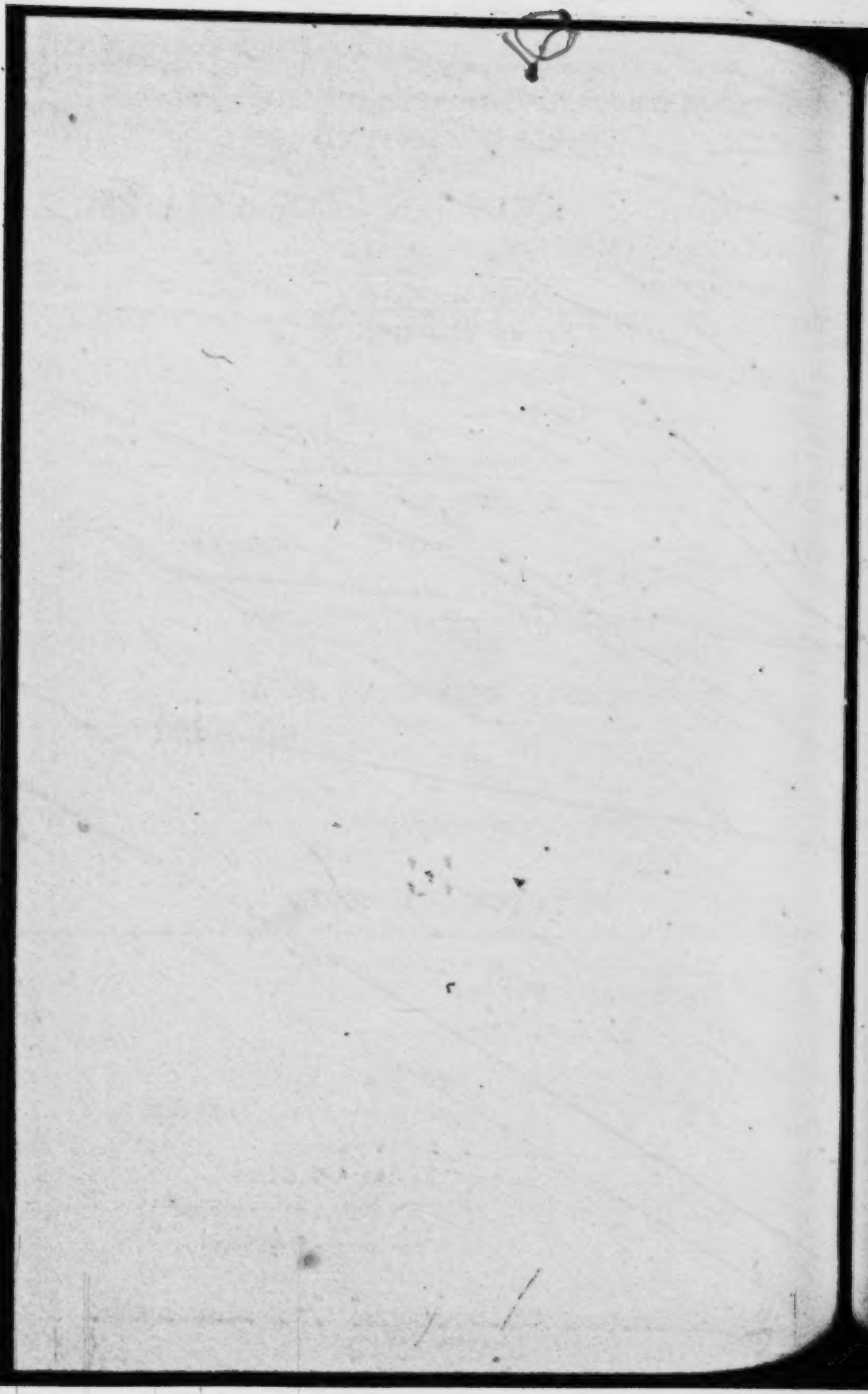

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BRIEF FOR PETITIONER

OPINIONS BELOW

The Memorandum Opinion of the United States District Court for the Northern District of Mississippi is unreported. It is set out in the Appendix, pp. 17-26. The Opinion of the United States Court of Appeals for the Fifth Circuit is reported at 455 F.2d 919 and is set out in the Appendix, pp. 33-34. The *per curiam* order denying a petition for rehearing is unreported. It is set out in the Appendix, pp. 36-37.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on January 20, 1972. A petition for rehearing was denied on February 25, 1972. The petition for a writ of certiorari was filed on April 6, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND RULES INVOLVED

§ 2255. Federal Custody; Remedies on Motion Attacking Sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral

attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

Rule 12, Federal Rules of Criminal Procedure. Pleadings and Motions Before Trial; Defenses and Objections

* * *

(b) The Motion Raising Defenses and Objections.

(1) Defenses and Objections Which May Be Raised. Any defense or objection which is capable of determination without the trial of the general issue may be raised before trial by motion.

(2) Defenses and Objections Which Must Be Raised. Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the pendency of the proceeding.

(3) Time of Making Motion. The motion shall be made before the plea is entered, but the court may permit it to be made within a reasonable time thereafter.

(4) Hearing on Motion. A motion before trial raising defenses or objections shall be determined before trial unless the court orders that it be deferred for determination at the trial of the general issue. An issue of fact shall be tried by a jury if a jury trial is required under the Constitution or an act of Congress. All other issues of fact shall be determined by the court with or without a jury or on affidavits or in such other manner as the court may direct.

(5) Effect of Determination. If a motion is determined adversely to the defendant he shall be permitted to plead if he had not previously pleaded. A plea previously entered shall stand. If the court grants a motion based on a defect in the institution of the prosecution or in the indictment or information, it may also order that the

defendant be held in custody or that his bail be continued for a specified time pending the filing of a new indictment or information. Nothing in this rule shall be deemed to affect the provisions of any act of Congress relating to periods of limitations.

QUESTION PRESENTED

Whether Rule 12(b)(2), F.R.Crim.P., bars a post-conviction claim, under 28 U.S.C. 2255, that Negroes were systematically excluded from the federal grand jury which indicted petitioner, without proof that he had waived that claim understandingly and knowingly.

STATEMENT OF THE CASE

On January 30, 1968, an indictment returned in the United States District Court for the Northern District of Mississippi, charged petitioner, a Negro,[1] and two others with entry of a federally insured bank with intent to commit larceny in violation of 18 U.S.C. 2113(a). On February 18, 1968, petitioner appeared with counsel for arraignment and was given thirty days to file motions. On March 6, 1968, petitioner moved to quash the indictment on the ground that it grew out of an illegal and unauthorized arrest.[2] The motion was overruled. Following a jury trial commencing on May 6, 1968, petitioner was found guilty and was sentenced to fourteen years' imprisonment. On April 14, 1969, his conviction was affirmed on appeal, 409 F.2d 1095.

On January 18, 1971, petitioner filed a motion, pursuant to 28 U.S.C. 2255 to vacate his conviction[3] on

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[1] R.4 (paragraph 4).

[2] The motion to quash is included in the original record filed with the Clerk. It is unpaginated.

[3] The motion was styled "Motion to Dismiss Indictment."

the ground that Negroes were systematically excluded from the grand jury which indicted him.[4] The motion rested explicitly upon the Fifth and Sixth Amendments and 28 U.S.C. 1861, 1863 and 1864, and alleged that grand juries in the Northern District of Mississippi had been selected unconstitutionally for twenty years (paragraph 3). The motion also alleged that petitioner "had not waived or abandoned this right to contest the Grand Jury array as set forth in the Federal Rules of Criminal Procedure Rule 12(B)" (paragraph 5). In addition, the motion alleged "that a timely oral motion was made in open court *before trial* by his Court appointed lawyer, *Mr. Paul M. Moore*, Calhoun City, Mississippi, said motion was then denied by the trial judge, *Honorable William C. Keady*. Petitioner's counsel did not assign this as error on direct appeal" (paragraph 7). This assertion was repeated in petitioner's traverse (paragraph 5) (Appendix, pp. 7-8). He also alleged in his motion that a "*Law Student* who was researching the grand jury array question within, was *stopped* from seeing petitioner by the Lafayette County Sheriff, whereas this point of law was lost as to the research necessary to carry the burden which it places upon the 'defendant' " (paragraph 6) (Appendix, p. 8).

The government's response (Appendix, p. 13) denied that any objection to the composition of the grand jury was raised prior to or at trial.

Concurrently with the filing of his 2255 motion, petitioner filed a motion for discovery and inspection designed to ferret out the facts regarding the method of selection for the jury rolls in the Northern District of

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[4]The motion is set out in its entirety in the Appendix, pp. 6-8.

Mississippi across a twenty-year period (Appendix, pp. 9-12).[5]

The district court overruled petitioner's motion to vacate without a hearing. Relying upon *Shotwell v. United States*, 371 U.S. 341 (1963), the court held that "under Rule 12(b)(2) [F.R.Crim.P.] a federal criminal defendant who failed to object to alleged defects in the composition of the grand and petit juries before trial waived such objections" (Appendix, p. 21). The court also relied upon a series of Fifth Circuit cases which had come to the same conclusion (Appendix, pp. 23-25). It rejected the Ninth Circuit's contrary rule in *Fernandez v. Mier*, 408 F.2d 974 (1969). As to federal habeas cases involving state prisoner claims of racial exclusion, the district court distinguished those on the ground that they "did not involve the interpretation of Rule 12, F.R.Crim.P." (Appendix, pp. 23-24).

Having concluded that petitioner "waived his objection" (Appendix, p. 23), the court inquired whether it should exercise the discretion allowed it by Rule 12(b)(2) "for cause shown." Finding neither "exceptional circumstances" nor "actual prejudice," the court concluded there was "no cause" (Appendix, p. 25).

Treating petitioner's claim that his attorney had made an oral motion before trial to challenge the method for selecting the grand jury, the trial judge, relying on his recollection of the proceedings and his review of the

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[5]The district court conceded that "the method of selecting grand jurors then in use [at the time of petitioner's indictment] was the same system employed by this court for years" (Appendix, pp. 24-25).

transcripts and docket entries, concluded that no such motion was made.[6]

On appeal, the Fifth Circuit affirmed on the basis of *Shotwell* and Rule 12(b)(2).

SUMMARY OF ARGUMENT

I. This case is controlled by *Kaufman v. United States*, 394 U.S. 217 (1969), which held that a claim of illegal search, said to have been waived below either because not raised or not appealed, is a proper claim to be heard on post-conviction review by a §2255 motion filed by a federal prisoner. The Court, relying upon *Townsend v. Sain*, 372 U.S. 293 (1963) and *Fay v. Noia*, 372 U.S. 391 (1963), held that constitutional claims could be reviewed by a §2255 motion on behalf of federal prisoners to the same extent as state prisoners.

Petitioner's claim alleges that he was indicted by a grand jury from which members of his race were systematically excluded. That claim rests upon a constitutional right which has been recognized and enforced by this Court for almost a century, from *Strauder v. West Virginia*, 100 U.S. 303 (1879) to *Peters v. Kiff*, 407 U.S. 493 (1972). In addition, a claim of racial discrimination in jury selection goes directly to the integrity of the fact finding process. Furthermore,

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[6]The petitioner claims that these findings are necessarily based on an incomplete record because, he asserts, the original records of his trial are lost, including the court reporter's shorthand notes or tape. Petitioner's Reply Brief, pp. 1-2. The Solicitor General has confirmed that at least some of the original trial record "were missing from the Court files." Brief For the United States In Opposition, p. 3, n. 2. Cf., the order of the court below denying a petitioner for rehearing, Appendix, p. 36-37.

petitioner will be presumed to have been prejudiced because of the exclusion of members of his race from the grand jury. *Peters v. Kiff, supra* at 509 (Burger, Ch. J., dissenting). For all these reasons, petitioner's claim is well within the parameters of *Kaufman v. United States*.

II. *Shotwell Manufacturing Co. v. United States*, 371 U.S. 341 (1963), relied upon by the courts below to support their rigid application of Rule 12(b), F.R.Crim.P. to the petitioner, is distinguishable: (1) The objections to the jury selection process in *Shotwell* predominantly involved legal irregularities, not constitutional defects; (2) There was no showing of prejudice in *Shotwell*; (3) The petitioners in *Shotwell* had had a hearing on their objections at trial.

III. Petitioner may be precluded only if it is established, as required by *Fay v. Noia*, that he "understandingly and knowingly" waived his claim in the trial court. Though *Noia* involved a state prisoner's post-conviction claim, its review of the history, breadth, and purpose of the federal writ of habeas corpus, apply equally to federal prisoners as they do to state prisoners. Critics of this Court's decisions concerning the scope of post-conviction review, including Judge Henry Friendly and Professor Paul Bator, would allow petitioner's claim to be heard.

Cases decided by the Fifth Circuit concerning state prisoners which are otherwise factually identical from the case at bar, allowed post-conviction relief and, cannot be distinguished on principle from petitioner's case.

ARGUMENT

I.

KAUFMAN V. UNITED STATES CONTROLS THE DISPOSITION OF THIS CASE.

This case is controlled by *Kaufman v. United States*, 394 U.S. 217 (1969). The petitioner in *Kaufman* was tried and convicted on charges of armed robbery of a federally insured savings and loan association. At trial, petitioner's appointed counsel had objected to the admission of certain evidence on grounds of unlawful search and seizure, but newly appointed appellate counsel did not assign the admission of the evidence as error either in his brief or on oral argument. A letter from petitioner to his appellate counsel asking him to submit the illegal search issue to the Court of Appeals was given to the panel after oral argument. The Court of Appeals affirmed the conviction without reference to the search and seizure claim. 394 U.S. at 393, n. 3.

Petitioner then filed a 2255 motion which included a claim that the finding of sanity was based upon the improper admission of unlawfully seized evidence. As to that, the district court said: "The record does not substantiate this claim. In any event, this matter was not assigned as error on Kaufman's appeal from conviction[7] and is not available as a ground for collateral attack on the instant §2255 motion." 268 F. Supp. 484, 487 (1967).[8] On a writ of certiorari here, the district court

[7] It is unclear from the opinions whether the search claimed to be illegal in the 2255 motion was the same search claimed to be illegal at trial.

[8] Applications for leave to appeal as a pauper having been denied by both the district court and court of appeals, the case was not heard by the Eighth Circuit.

was reversed. This Court held "that a claim of unconstitutional search and seizure is cognizable in a §2255 proceeding." 394 U.S. at 231.[9]

In deciding *Kaufman*, this Court was confronted by the United States with three principal arguments: first, that a motion under 2255 cannot be used in lieu of an appeal (394 U.S. at 222-223); second, that unlike other claims which have been allowed on 2255 motions, a claim of illegal search and seizure does not impugn the integrity of the fact-finding process or challenge evidence as inherently unreliable (394 U.S. at 224); and, third, that "federal post-conviction relief should not be available to federal prisoners in as broad a range of cases as that when presented by state prisoners" (394 U.S. at 225-226).

Treating the first objection, the Court, relying upon *Sunal v. Large*, 332 U.S. 174 (1947), contrasted "errors in trial procedure which do not cross the jurisdictional line," on the one hand, with "relief for *constitutional* claims asserted by federal prisoners," on the other.[10] Where the latter are concerned, federal habeas corpus relief[11] is not limited by the rule that "a motion under

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[9] *Kaufman* has since been applied to allow a 2255 claim alleging the use of an involuntary statement in evidence though not raised at trial, *Howell v. United States*, 442 F.2d 265 (7th Cir. 1971), and to a claim that incriminating statements were admitted into evidence, though again there was no objection at trial, *Tucker v. United States*, 427 F.2d 615 (D.C. Cir. 1970).

[10] *Sunal v. Large* itself involved a non-constitutional trial error. *Kaufman v. United States*, 394 U.S. at 223, n. 7.

[11] The scope of a 2255 motion is, of course, as broad as the writ of habeas corpus. *United States v. Hayman*, 342 U.S. 205 (1952); *Hill v. United States*, 368 U.S. 424 (1962); *Sanders v. United States*, 373 U.S. 1 (1963); *Kaufman v. United States*, 394 U.S. at 221-224.

§2255 cannot be used in lieu of appeal."[12] As to the second objection, the Court held that "the availability of collateral remedies is necessary to insure the integrity of proceedings at and before trial where constitutional rights are at stake" (394 U.S. at 225).

The government's third argument rested on several propositions: (1) the necessity that federal courts have the last say with respect to questions of federal law; (2) the inadequacy of state procedures to raise and preserve federal claims; (3) the concern that state judges may be unsympathetic to federally created rights; and (4) the institutional constraints on the exercise of this Court's certiorari jurisdiction to review state court proceedings. To all of those, the Court responded:

> The opportunity to assert federal rights in a federal forum is clearly not the sole justification for federal post-conviction relief; otherwise there would be no need to make such relief available to federal prisoners at all. The provision of federal collateral remedies rests more fundamentally upon a recognition that adequate protection of constitutional rights relating to the criminal trial process requires the continuing availability of a mechanism for relief.

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[12] See, *United States v. Alloco*, 305 F.2d 704 (2nd Cir. 1962), *cert. denied* 371 U.S. 964 (1963), which allowed collateral attack on a claim that the trial judge was appointed illegally. The issue was not raised on trial or appeal. The Second Circuit held that "the present case . . . raises such important issues that we believe that petitioner should not be foreclosed from asserting them in this collateral proceeding" (at 707); *Haith v. United States*, 330 F.2d 198 (3rd Cir. 1964), which held that a claim that trial judge was not present when jury was selected, was "of such fundamental importance" (at 200), a 2255 motion would be heard. Cf. *United States v. Stirone*, 341 F.2d 253 (3rd Cir. 1965), *reversed on other grounds*, 381 U.S. 902 (1965).

This is no less true for federal prisoners than it is for state prisoners (394 U.S. at 226).

Reviewing *Townsend v. Sain*, 372 U.S. 293 (1963), the Court concluded that with the single exception of the fact-finding procedure, all the considerations supporting federal court review of state prisoners' constitutional claims apply equally to federal prisoners. "We perceive no difference between the situations of state and federal prisoners which should make allegations of the other circumstances listed in *Townsend v. Sain* less subject to scrutiny by a §2255 court" (394 U.S. at 227). Furthermore, invoking *Fay v. Noia*, 372 U.S. 391 (1963), which rejected "conventional notions of finality" in state criminal litigation, the Court said "there is no reason . . . to give greater preclusive effect to procedural defaults by federal defendants than to similar defaults by state defendants. To hold otherwise would reflect an anomolous and erroneous view of federal-state relationships" (394 U.S. at 228).[13]

The facts of the case at bar are clearly encompassed by the *Kaufman* analysis; in one central respect they are even more compelling.

First, the issue in this case, the right to indictment by juries selected without racial discrimination, is a constitutional right which has been recognized and enforced by this Court for almost a century, from *Strauder v. West Virginia*, 100 U.S. 303 (1879), to *Peters*

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[13]In *Sanders v. United States*, 373 U.S. 1, 18 (1963), decided the month following *Noia*, the Court, deciding a 2255 case, said of the question of foreclosure of federal collateral relief, "The principles developed in [*Noia* and *Townsend*] govern equally here."

v. Kiff, 407 U.S. 493 (1972).[14] It is an elementary right that implicates a variety of values of a free society. The bias which inheres in a grand jury from which a particular race has been excluded (see *Peters v. Kiff, supra*), is a "fundamental defect which results in a complete miscarriage of justice . . . [and is] inconsistent with the rudimentary demands of fair procedure." *Hill v. United States*, 368 U.S. 424, 428 (1962). As this Court recently noted in *Carter v. Jury Commission*, 396 U.S. 320, 329 (1970), "The exclusion of Negroes from jury service because of their race is 'practically a brand upon them . . . , an assertion of their inferiority . . . .' That kind of discrimination contravenes the very idea of a jury—'a body truly representative of the community,' composed of 'the peers or equals of the person whose rights it is selected or summoned to determine . . . ' " The fact that it has been a crime since 1875 to disqualify anyone from jury service because of race or color,[15] reflects the special significance of the constitutional right involved here. See *Peters v. Kiff, supra* at 505 (White, J., concurring). Furthermore the statute applicable at the time of petitioner's indictment, 28 U.S.C. 1863(c), explicitly forbade exclusion from grand or petit jury service "on account of race or color." The same prohibition, among others, is set out in the 1968 amendments. 28 U.S.C. 1862. The essentiality of the right to a fairly selected jury in federal prosecutions has also been emphasized by this Court in *Thiel v. Southern Pacific*, 328 U.S. 217 (1946); and in *Ballard v. United States*, 329 U.S. 187 (1946).[16]

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[14] The cases are collected in *Peters v. Kiff*, 407 U.S. at 496-497, notes 4-6.

[15] 18 U.S.C. §243.

[16] *Thiel* and Ballard were decided on supervisory power grounds. References in both cases to the Sixth Amendment and state jury exclusion cases, leave no doubt that the interests encompassed by

There can therefore be no dispute that the right asserted by petitioner here is well within the class of rights which have traditionally supported the exercise of the power of habeas corpus.[17]

Second, the feature of this case which makes it even more compelling than *Kaufman* is that the method of selection of the grand jury involves the integrity of the fact-finding process. That was a factor which the government put forward in *Kaufman* as a distinction between claims which should and should not support the allowance of post-conviction claims. The Court's most recent decision involving exclusion of Negroes from the jury selection system, *Peters v. Kiff, supra*, leaves no doubt of the centrality of grand and petit juries to the integrity of the criminal justice system.

Peters v. Kiff involved a white defendant in a state prosecution who alleged that Negroes were systematically excluded from the grand jury which indicted him and the petit jury that convicted him of burglary. The Court held that, as a matter of due process, the petitioner could

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the supervisory power are at least as broad as those subject to enforcement by the Fourteenth Amendment.

[17] In this case, in particular, there is good reason to believe that there is a high probability that petitioner's claims are sound, for the government concedes that, at the time of petitioner's indictment, jurors were selected in the Northern District of Mississippi by the "key-man" system. (Brief for the United States in Opposition, p. 4, n. 3.) The racially exclusive consequences of that system are described in *Rabinowitz v. United States*, 366 F.2d 34 (1966). The key-man system is prohibited by the Federal Jury Selection Act of 1968.

challenge the exclusion of Negroes because "Illegal and unconstitutional jury selection procedures cast doubt on the integrity of the whole judicial process. They create the appearance of bias in the decision of individual cases, and they increase the risk of actual bias as well" (407 U.S. at 502). This conclusion on due process grounds, which provoked dissents from three Justices, is surely undebatable when, as in the case at bar, the claim is made by a member of the excluded class on equal protection principles, thereby raising a presumption of prejudice. *Strauder v. West Virginia*, 100 U.S. 303, 309 (1879). As Mr. Chief Justice Burger said dissenting in *Peters v. Kiff*, 407 U.S. at 509, "This presumption of prejudice derives from the fact that the defendant is a member of the excluded class . . . "[18]

Kaufman, therefore, is powerful precedent for the case at bar. It is, in fact, dispositive, but for the issue taken up in Point II.

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[18]See *Alexander v. Louisiana*, 405 U.S. 625 (1972), involving a challenge to the exclusion of Negroes to the grand jury by a black defendant, where the Court said: "The principles which apply to the systematic exclusion of potential jurors on the grounds of race are essentially the same for grand juries and for petit juries . . . " 405 U.S. at 626, n. 3. The Court made the same observation in *Peters v. Kiff*, 407 U.S. at 495: " . . . the principles governing the two claims are identical." For a catalogue of the centrality of juries to the integrity of the criminal justice system, see *Duncan v. Louisiana*, 391 U.S. 145, 151-159 (1968).

II.

SHOTWELL V. UNITED STATES IS DISTINGUISHABLE FROM THE CASE AT BAR

If there were no other considerations involved in the decision of this case but those which were canvassed in Point I, petitioner's claims would surely prevail. But there are, of course, the apparent obstacles presented by Rule 12(b)(2), F.R.Crim.P. and *Shotwell Manufacturing Co. v. United States*, 371 U.S. 341 (1963).

Rule 12(b)(2) provides:

> . . . defects . . . in the indictment other than that it fails to show jurisdiction in the court . . . may be raised only by motion before trial . . . . Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver.

Construing Rule 12(b)(2), *Shotwell* said, "Petitioners concede, as they must, that this Rule applies to their objection to the grand jury array . . . " 371 U.S. at 362.

Petitioner's argument around 12(b) and *Shotwell* rests primarily upon the principles enunciated in *Fay v. Noia*. Before reaching that main argument, however, we would point out that the case at bar is not controlled by *Shotwell* because it is factually and conceptually distinguishable.

The petitioners in *Shotwell* were convicted of income tax evasion. On certiorari to this Court, the case was remanded for further proceedings on a suppression issue. 355 U.S. 233 (1957). On remand, the district court took additional evidence and again denied the suppression motion. At that stage of the case, petitioners filed

motions for a new trial and challenges to the original grand and petit jury arrays. 371 U.S. at 345. Those challenges alleged that the juries were "illegally constituted because the jury commissioner delegated his selection duties to one of his private employees; volunteers were permitted to serve on the juries; and the Clerk of the District Court failed to employ a selection method designed to secure a cross-section of the population." 371 U.S. at 361-362. In this Court, the petitioners conceded, "as they must" said Mr. Justice Harlan, that Rule 12(b)(2) barred their objections to the grand jury array.

The concession by petitioners in *Shotwell*, leading to the easy conclusion by Mr. Justice Harlan that they had no alternative, of course deprived this Court of any adversarial perspective on the issue and cannot be deemed conclusive against petitioner here. The nature of petitioner's case, resting as it does on the fundamental constitutional claim that he was indicted by a grand jury from which members of his race were systematically excluded, requires this Court to examine the issue freshly without being bound by the *Shotwell* concession. Indeed, that concession need not and should not have been made, since it was apparent at the time *Shotwell* was argued, that this Court treated objections to the composition of grand and petit juries similarly, without reference to their different functions. See Point I, *supra* note *18*. For that reason, the factual distinctions set out below between the case at bar and *Shotwell* must be taken as relevant even though the former involves grand juries and the latter petit juries. Those distinctions are threefold.

First, the objections to the array in *Shotwell* involved legal irregularities which did not rise to the dimension of the fundamental constitutional right asserted by peti-

tioner at bar. 371 U.S. at 361-362.[19] Likewise, the facts in *Scales v. United States*, 367 U.S. 203 (1961), relied upon by Mr. Justice Harlan in construing Rule 12(b)(2), 371 U.S. at 362, n. 24, involved only illegalities: failing to select the grand jury panel "from a box containing the names of at least three hundred qualified persons" and "insufficient investigation of the persons on the list." 260 F.2d 45.[20]

Second, *Shotwell* said that "... both courts below have found that petitioners were not prejudiced in any way by the alleged illegalities in the selection of the

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[19]One of the objections in *Shotwell* did assert that the Clerk failed to employ a selection method designed to secure a cross section of the population. That is, of course, a very substantial defect which has invoked the exercise of the Court's supervisory powers over the administration of justice in the federal courts, *Thiel v. Southern Pacific, supra; Ballard v. United States, supra,* and which would justify reversal of state court convictions on constitutional grounds. But that apparent inconsistency must be read in light of our third distinction between *Shotwell* and the instant case which points out that, in fact, the *Shotwell* petitioners had a hearing on their claims, but were unable to sustain them on the merits. 371 U.S. at 363. That would explain the Court's conclusion that "*In the circumstances of this case*, petitioners' contentions are without foundation" (*Ibid.*) (emphasis added).

[20]In addition *Scales* conceded that "the defendant was not prejudiced" (*Ibid.*). Absence of prejudice, as well as the absence of any constitutional violation, was also found in *United States v. Clancy*, 276 F.2d 617, 632, *reversed on other grounds*, 365 U.S. 312 (1961), another case relied upon by Mr. Justice Harlan. See discussion of prejudice below. In the third case which Mr. Justice Harlan relied upon, *Miranda v. United States*, 255 F.2d 9 (1st Cir. 1958), a challenge to the composition of the grand jury based upon "the absence of women" (at 16), was denied because untimely. The report of the case supplies no other facts.

juries. Nor do petitioners point to any resulting prejudice" (371 U.S. at 363). In the case at bar, prejudice is presumed. *Peters v. Kiff*, 407 U.S. at 509.

Third, the trial court in *Shotwell* held a hearing on the objections to the jury. 371 U.S. at 363. Thus, the waiver finding was only an alternative basis for decision.[21] Petitioner here has had no hearing on his claim.

Given these distinctions, the Court should not consider the *Shotwell* construction of Rule 12(b)(2) controlling in this case. Rather, Rule 12(b)(2) must be construed under the principles enunciated in *Fay v. Noia*, as was Rule 41(e) in *Kaufman*.

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[21] An evidentiary hearing was also held in *Scales*. See 260 F.2d at 44-45. Moore's Federal Practice, ¶12.02[2], n. 21 is critical of *Scales* on that account:

> *Scales* was a Smith Act prosecution in which the defendant sought to raise the defense of unlawful selection of the grand jury. The motion was made *before trial*, twenty-five days after expiration of the extended period for making motions .... Instead of denying the motion as untimely, the trial court proceeded to hold a hearing on the grand jury issue. It thereafter denied relief on the merits, as well as on the ground of waiver. The Court of Appeals affirmed on the waiver ground only. Beside the fact that there was no waiver under Rule 12(b)(2), disposing of the issue on this ground makes little sense since a hearing was held and the merits of the motion decided by the trial court.

III.

PETITIONER MAY BE PRECLUDED ONLY IF IT IS ESTABLISHED THAT HE "UNDERSTANDINGLY AND KNOWINGLY" WAIVED HIS CLAIM IN THE TRIAL COURT.

A. The Waiver Principle in *Fay v. Noia* Applies In This Case.

At stake in *Noia* was the scope and function of the writ of habeas corpus, the Great Writ:[22]

> Its root principle is that in a civilized society, government must always be responsible for a man's imprisonment: if the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release. 372 U.S. at 402.

The opinion's comprehensive review of the history of the writ stressed its broad sweep and its indispensable role is protecting individual citizens from arbitrary and lawless action of government by which "the processes of justice are actually subverted." 372 U.S. at 471, quoting Mr. Justice Holmes in *Frank v. Magnum*, 237 U.S. 309, 346 (1915)) (dissenting opinion).

Given the principles underlying the writ, and the fundamental purposes it is meant to serve, the Court held in *Noia*, against strong arguments based on "the exigencies of federalism" (372 U.S. at 415), that state prisoners had recourse to federal habeas even though the state courts, because of the prisoner's procedural default, would not entertain the federal claim.

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[22] Again, 2255 is equivalent in every respect to the writ of habeas corpus. *Supra*, n. 11.

> . . . we have consistently held that federal court jurisdiction is conferred by the allegation of an unconstitutional restraint and is not defeated by anything that may occur in the state court proceedings. State procedural rules must plainly yield to this overiding federal policy. 372 U.S. at 426-427.

The Court declared only two qualifications upon the exercise of the habeas power by the federal courts: (1) the state prisoner must first exhaust state remedies still open to him (372 U.S. at 435); and (2) the federal courts may deny habeas relief if the state prisoner has "deliberately bypassed the orderly procedure of the state courts" (372 U.S. at 438).[23]

By its own terms, the *Noia* thesis applies to post-conviction review of claims, at least of constitutional dimensions, of federal prisoners. The history of the writ, its breadth, and its purpose, as described in *Noia*, all apply to federal prisoners. Indeed, as *Noia* pointed out, the history of the application of the writ to review federal convictions, long pre-dated that decision. The opinion said explicitly that "restraints contrary to our fundamental law, the Constitution, may be challenged on federal habeas corpus even though imposed pursuant to the conviction of a federal court of competent jurisdiction" (372 U.S. at 409), citing twenty-three cases dating back to 1877 to support the statement (note 17).

Of the two qualifications to the general *Noia* principle, only the waiver principle has application to federal prisoners. But its application to federal prisoners is

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[23] This principle was very recently reaffirmed in this Court's unanimous decision in *Humphrey v. Cady*, 405 U.S. 504 (1972). See also *Henry v. Mississippi*, 379 U.S. 443 (1965).

co-extensive to its application to state prisoners. *Kaufman v. United States, supra* at 228, so held: "... there is no reason ... to give greater preclusive effect to procedural defaults by federal defendants than to similar defaults by state defendants." Consequently, petitioner can be found to have forfeited his right to raise his claim only if his failure to comply with Rule 12(b)(2) is found to be the result of an understanding and knowing waiver, or a deliberate by-pass.

The Ninth Circuit has explicitly adopted this rule in *Fernandez v. Meier*, 408 F.2d 974 (1969). *Fernandez* too involved a claim of systematic exclusion, in that case of Spanish-Americans. After conviction he filed a 2255 motion on the exclusion claim, which he had not raised at trial. The question then was whether the defendant was precluded under Rule 12(b)(2). The court, rejecting *Shotwell*, held that, under *Noia* and *Sanders v. United States, supra*, he was not.[24] A subsequent Ninth Circuit decision reaffirmed that view. (*Chee v. United States*, 449 F.2d 747 (1971).) The Tenth Circuit seems now to have adopted the same view. *United States v. Dowell*, 446 F.2d 145 (1971), *cert. denied* 404 U.S. 984 (1971).

Even Judge Henry Friendly, one of the severest critics of this Court's decisions expanding post-conviction relief for both state and federal prisoners, believes that the precise kind of claim asserted here by petitioner deserves a collateral hearing. In his article, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 Univ. of Chi. L. Rev. 142 (1970), specifically addressing

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[24]The Ninth Circuit, by saying that "Perhaps the Court, in deciding *Sanders v. United States, supra*, might have chosen to rely upon Rule 12(b)(2) ..." (408 F.2d at 977), seems to have misread *Sanders*. However, that does not affect the court's application of *Sanders* and *Noia*.

post-conviction claims that go to "racial discrimination in the selection of juries" (*Id.* at 141), as well as to claims asserting improper influence upon jurors by a court officer, or that a jury was overcome by excessive publicity, Judge Friendly said:

> In such cases the criminal process itself has broken down; the defendant has not had the kind of trial the Constitution guarantees. To be sure, there remains a question why, if the issue could have been raised on appeal and either was not or was decided adversely, the defendant should have a further opportunity to air it. Still, in these cases where the attack concerns the very basis of the criminal process, few would object to allowing collateral attack regardless of the defendant's probable guilt. *Id.* at 151-152.

Another critic, Professor Bator, evidently agrees. In his article, Finality in Criminal Law and Federal Habeas For State Prisoners, 76 Harv.L.Rev. 441 (1963), he discusses the kind of claims which he believes can properly be heard collaterally. Though he does not specifically refer to jury discrimination, he does refer to bribed judges, mob domination, and torture (*Id.* at 455). "In all of them," he says, "the inquiry is initially directed, not at the question whether substantive error of fact or law occurred, but at whether the process previously employed for determination of questions of fact and law were fairly and rationally adapted to that task" (*Id.* at 456). Jury discrimination is certainly encompassed in that class of cases. And Professor Amsterdam, who would have decided *Kaufman* differently, would no doubt decide this case in petitioner's favor. See Search, Seizure and Section 2255: A Comment, 112 U.Pa.L.Rev. 378, 385-386 (1964).

The Court should take the occasion of this case, therefore, to adopt the rule that where a constitutional challenge to the system of selecting grand or petty juries is first raised by a 2255 motion, the principles of *Kaufman* and *Noia* are to be applied.

B. The Waiver Principle Put Forward by Petitioner Has Been Applied by the Fifth Circuit in State Prisoner Cases Identical to the Case at Bar.

In four cases decided by the Fifth Circuit, two of which pre-dated *Fay v. Noia*, that court applied the same waiver principles as did *Noia* to cases which, but for the fact they involved state rather than federal prisoners, are indistinguishable on principle from the case at bar. *United States ex rel Goldsby v. Harpole*, 263 F.2d 71 (1959), *cert. denied* 361 U.S. 838 (1959); *United States ex rel Seals v. Wiman*, 304 F.2d 53 (1962), *cert. denied* 372 U.S. 924 (1963) *Whitus v. Balkcom*, 333 F.2d 496; and *Cobb v. Balkcom*, 339 F.2d 95 (1964).

In these cases, the defendants, all black, were convicted of capital crimes and sentenced to death. None of them raised the jury exclusion issue at trial and were held to have waived that claim by the State courts.[25] Subsequently, on federal habeas corpus, the Fifth Circuit held that there was no waiver in any of the cases, notwithstanding non-compliance with state procedural rules, and they were all remanded to the various district courts for hearings. Without lengthy discussion of the

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[25] In *Harpole*, by the Mississippi Supreme Court; in *Seals* by the Alabama Supreme Court; and in *Whitus* and *Cobb* by the Georgia Supreme Court.

details of the four cases, it is adequate for present purposes to quote the Fifth Circuit's own summary of those cases:

> . . . [T]he prior decisions of this court have established three situations, all capital cases, in which a state criminal defendant's failure to object to jury composition will not constitute a waiver barring relief on federal habeas corpus. If defendant's counsel fails to consult with him concerning his rights (*Harpole*), or where there is failure to consult plus the fact that the evidence of systematic exclusion is neither known nor easily ascertainable at the time of trial (*Wiman*), or where the defendant or his counsel failed to object through fear of engendering hostility (*Whitus*), there is no valid waiver. (*Cobb v. Balkcom, supra* at 101-102.).

Cobb rested on *Fay v. Noia*, of course, as did *Whitus*.[26] But *Harpole* and *Wiman* had to look elsewhere for support. They found it in earlier cases of this Court. *Harpole*, after first reviewing the seriousness of the claim in constitutional terms rested on *Johnson v. Zerbst*, 304 U.S. 458 (1938), which held (263 F.2d at 76-79):

> . . . courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and . . . we 'do not presume acquiescense in the loss of fundamental rights.'

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[26]The Third Circuit has reached the same result on identical facts. *Wade v. Yeager*, 377 F.2d 841 (1967). In more recent cases, the Fifth Circuit again upheld federal habeas claims on jury exclusion grounds by state prisoners who had plead guilty. The court found the guilty plea an ineffective waiver because not made voluntarily or knowingly. *Colson v. Smith*, 438 F.2d 1075 (1971). *Winter v. Cook*, 466 F.2d 1393 (1972).

Wiman, likewise, reviewed the cases which characterized jury exclusion as a fundamental constitutional defect (304 F.2d at 65-67), and rested on *Price v. Johnston*, 334 U.S. 266 (1948), which held (304 F.2d at 68):

> The primary purpose of a *habeas corpus* proceeding is to make certain that a man is not unjustly imprisoned. And, if for some justifiable reason he was previously unable to assert his rights or was unaware of the significance of relevant facts, it is neither necessary nor reasonable to deny him all opportunity of obtaining judicial relief.

These decisions, combined with this Court's holdings in *Noia* and *Townsend v. Sain*, which rejected any distinctions between post-conviction review of state and federal convictions, either as to the scope of that review or the effect of procedural defaults, lead inevitably to the result that the claim put forward by petitioner here, must be heard on a 2255 motion. That result is required, on the broadest ground, because petitioner's claim is of constitutional dimension. It is required, on a slightly narrower ground, because the specific nature of the claim, if proven, infects the integrity of the judicial system. It is required on the narrowest ground, because of the special circumstances, described graphically in *Harpole*, *Wiman*, *Cobb* and *Whitus*, which surround the assertion of racial exclusionary practices in the deep south.

But if that result is so inevitable, why was it not perceived by the Fifth Circuit in this case? Petitioner would suggest that the answer might be that the Fifth Circuit assumes that, no matter what the jury selection practises might be in the state courts in the South, and no matter how grisly a choice might confront a white lawyer and his black client in the assertion of such a claim in the

state courts in the South, such practices and such choices do not exist in the federal courts in the South. But given the cultural and political facts described in *Harpole*, *Wiman*, *Cobb* and *Whitus*, that can only be an assumption. Without a record and without any facts, neither the Fifth Circuit nor this Court can make such an assumption. It is precisely for that reason that petitioner's 2255 motion must be heard: first, to vet the whole issue of waiver, both in general and, if necessary, in terms of the special southern circumstances; and, second, to hear the motion on the merits should it be established that petitioner did not waive.

C. The Hearing on Remand.

On remand, the hearing afforded petitioner should consist of two stages. The first stage should inquire into the question of waiver in the terms set out in *Fay v. Noia*. Petitioner, of course, alleges in his motion not only that he did not waive the jury exclusion claim, but that such a motion was in fact made orally by his attorney. Even if that latter allegation is not sustained, further inquiry will be required to determine whether there was a *Noia* waiver, quite apart from whether any oral motion was made.[27]

If the proof is unable to support a finding that petitioner waived his claim, the second stage of the hearing will then go into the merits of the substantive claim concerning exclusion of Negroes from the grand jury.

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[27] The nature of the required hearing is described in *Machibroda v. United States*, 368 U.S. 487 (1962).

CONCLUSION

For the reasons set forth above, the decision below should be reversed and the case remanded to the district court for a hearing.

Respectfully Submitted,

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December 1972

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-6481

CLIFFORD H. DAVIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinions of the court of appeals affirming the order of the district court (A. 33–35) and denying rehearing (A. 36–37) are reported at 455 F. 2d 919. The opinion of the district court denying the motion for collateral relief (A. 17–26) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 20, 1972 (A. 35). A petition for rehearing was denied on February 25, 1972 (A. 36). The petition for a writ of certiorari was filed on April 6, 1972, and granted on October 10, 1972. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court properly exercised its discretion in denying without a hearing a collateral attack on a conviction based on petitioner's assertion that the system used for selecting grand jurors at the time of his indictment systematically excluded Negroes from grand juries, where petitioner failed to challenge the grand jury array prior to trial as required by Rule 12(b) of the Federal Rules of Criminal Procedure and made no showing of cause warranting relief from that rule.

STATUTES AND RULE INVOLVED

Rule 12(b) of the Federal Rules of Criminal Procedure provides in pertinent part:

(*b*) *The Motion Raising Defenses and Objections.*

(*1*) *Defenses and Objections Which May Be Raised.* Any defense or objection which is capable of determination without the trial of the general issue may be raised before trial by motion.

(*2*) *Defenses and Objections Which Must Be Raised.* Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment or information to charge an

offense shall be noticed by the court at any time during the pendency of the proceeding.

(3) *Time of Making Motion.* The motion shall be made before the plea is entered, but the court may permit it to be made within a reasonable time thereafter.

(4) *Hearing on Motion.* A motion before trial raising defenses or objections shall be determined before trial unless the court orders that it be deferred for determination at the trial of the general issue. An issue of fact shall be tried by a jury if a jury trial is required under the Constitution or an act of Congress. All other issues of fact shall be determined by the court with or without a jury or on affidavits or in such other manner as the court may direct.

* * * * *

18 U.S.C. 3771 provides:

The Supreme Court of the United States shall have the power to prescribe, from time to time, rules of pleading, practice, and procedure with respect to any or all proceedings prior to and including verdict, or finding of guilty or not guilty by the court if a jury has been waived, or plea of guilty, in criminal cases and proceedings to punish for criminal contempt of court in the United States district courts, in the district courts for the District of the Canal Zone and the Virgin Islands, in the Supreme Court of Puerto Rico, and in proceedings before United States magistrates. Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof

but not later than the first day of May, and until the expiration of ninety days after they have been thus reported. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court.

* * * * *

28 U.S.C. (1964 ed.) 1863(c), at the relevant times, provided:

No citizen shall be excluded from service as grand or petit juror in any court of the United States on account of race or color.

28 U.S.C. (1964 ed.) 1864, at the relevant times, provided:

The names of grand and petit jurors shall be publicly drawn from a box containing the names of not less than three hundred qualified persons at the time of each drawing.

The jury box shall from time to time be refilled by the clerk of court, or his deputy, and a jury commissioner, appointed by the court. Such jury commissioner shall be a citizen of good standing, residing in the district and a well known member of the principal political party in the district, opposing that to which the clerk, or his deputy then acting, may belong. He shall receive $5 per day for each day necessarily employed in the performance of his duties.

The jury commissioner and the clerk, or his deputy, shall alternately place one name in the jury box without reference to party affiliations,

until the box shall contain at least 300 names or such larger number as the court determines. This section shall not apply to the District of Columbia.

28 U.S.C. 2255 provides in pertinent part:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or

resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

* * * * *

STATEMENT

1. *The Pre-Trial Proceedings.*

An indictment returned in the United States District Court for the Northern District of Mississippi on January 30, 1968, charged petitioner, a Negro, and two others, both white, with entry into a federally insured bank with the intent to commit larceny in violation of 18 U.S.C. 2113(a). On February 18, 1968, petitioner appeared with his appointed counsel for arraignment [1] and entered a plea of not guilty. At the time he was given thirty days within which to file pre-trial motions (A. 2).[2] On March 6, 1968, petitioner filed a motion to quash the indictment on the ground that the indictment was the result of an illegal arrest

[1] The district court's memorandum opinion refers to arraignment on March 21, 1968 (A. 19). This is obviously an inadvertent reference to the date the transcript of the arraignment was filed.

[2] On this same date petitioner appeared for arraignment without counsel on a separate charge of escape. Arraignment on this charge was continued until separate counsel could be appointed. On March 8, 1968, petitioner appeared with appointed counsel for arraignment, entered a plea of not guilty, and was given thirty days within which to file motions. The escape prosecution was eventually dismissed.

(A. 31). No other pre-trial motions attacking the indictment were filed.

On May 6, 1968, following *voir dire* of the jury in open court (II T. 1–36),[2] the district court ruled on the pre-trial motions in chambers (II T. 30–33), ordering that the motion to dismiss the indictment on the ground of illegal arrest would be carried with the case (II T. 33–34). The trial judge then twice asked petitioner and his counsel if there was anything else and, receiving no response, the proceedings where returned to open court and the trial commenced (II T. 35–36).

2. The Trial and the Appeal.

The evidence at trial was overwhelming. The record, which is detailed in the opinion of the court of appeals on direct appeal, 409 F. 2d 1095, 1096–1098 (C.A. 5), showed that petitioner and his two accomplices were apprehended about 4:30 A.M. attempting to flee from the scene of a bank burglary in Hickory Flat, Mississippi. Petitioner's clothes and shoes were found to contain residue from the break-in of the bank and slag from the cutting torch used to open the vault. Other evidence connected petitioner's two accomplices with the bank and with the car and truck parked outside the bank during the burglary. Petitioner offered no evidence in his defense.

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[2] During the *voir dire* of the petit jury, petitioner's counsel specifically asked whether any juror would feel any prejudice toward the defendant because he was a Negro (II T. 14). "T" refers to the transcript of proceedings in the record on appeal of the original conviction. A copy of the record in four volumes has been lodged with the Clerk.

During the two and one-half days of trial, no other question was raised with respect to the indictment (II T. 37–IV T. 521). The jury found petitioner guilty. On May 21, 1968, he filed a written motion for new trial alleging nine grounds, none of which went to the indictment (A. 29). After a hearing on May 23, 1968, the motion for new trial and the earlier motion to dismiss the indictment were denied (IV T. 522, 561–564). An oral motion for new trial which did not go to the indictment was then presented and denied (IV T. 564–604). Petitioner was later sentenced to imprisonment for fourteen years.[4]

On appeal, petitioner's assignments of error did not relate to the alleged exclusion of Negroes from the grand jury. On April 14, 1969, petitioner's conviction was affirmed. 409 F. 2d 1095 (C.A. 5). (The court of appeals commented at that time: "We have rarely witnessed a more thorough or more unstinted expenditure of effort by able counsel on behalf of a client." 409 F. 2d at 1101).

3. *The Motion to Vacate Sentence.*

On January 19, 1971, petitioner filed a motion (A. 6–8) pursuant to 28 U.S.C. 2255 asking the court to dismiss the indictment on the ground that the grand jury that had returned it was "an unconstitutional array, inasmuch as it did not meet the mandatory

[4] The petitioner cannot contend that he was naive or inexperienced in the criminal process. He was forty-one years old and had a long criminal record including two prior federal felony convictions and two prior state felony convictions. (Unnumbered transcript of sentencing proceedings of May 24, 1968).

requirement of the statute laws set forth * * * in title 28, U.S.C.A. Section 1861, 1863, 1864, and the 5th amendment of the United States Constitution". He specified "that the jury commissioner and Clerk of Court for the Northern District of Mississippi for the past 20 years implementing the 'Keyman' and 'Selectors', system cause nought to [sic] token in their selection of prospective qualifying Negro jurymen because of their race in violation of Section 1863" and "that the Northern District Court has by its affirmative action taken for the past 20 years has acquiesced to systematically, purposefully, unlawfully and unconstitutionally excluded [sic] the prospective qualified resident Negroes from the Grand Jury box in violation of Section 1864" (A. 6–7).

Petitioner also alleged that he had neither waived nor abandoned the right to contest the array under Rule 12, Fed. R. Crim. P., that "the court's appointed *Law Student,*[1] who was researching the Grand Jury array question within, * * *, was *stopped* from seeing petitioner by the Lafayette County Sheriff" and that "a timely oral motion was made in open court *before trial* by his Court appointed lawyer" (A. 8). In an accompanying motion for discovery and inspection (A. 9–12), petitioner sought any documents setting forth the method used to obtain names of prospective jurors, and copies of questionnaires mailed to prospective jurors over the prior twenty years. He

[1] A law student had been assigned to assist petitioner's court-appointed attorney in preparation of his defense to the separate escape indictment.

also included a series of interrogatories relating to the selection of grand jurors during that period.

The United States denied each of the allegations of the motion, and asserted that, in any event, petitioner was entitled to no relief because the files and records of the case conclusively showed that he had not previously at any time raised any objection to the grand jury (A. 13).

On June 14, 1971, the district court filed an opinion denying the motion without a hearing (A. 17-26). The court stated (A. 19):

> The Court recalls no such oral motion having been made. In order to avoid any possible oversight, injurious to the rights to the petitioner, the court has read in full the transcript of the proceedings at every stage of petitioner's prosecution and has read the entire jacket file, including docket entries. These voluminous records reveal that not the slightest reference was made to the composition of the grand jury either by petitioner or by his attorney at any stage of the proceedings. * * * The court finds, therefore, that petitioner did not object to the composition of the grand jury prior to trial and did not raise such an objection at any other stage of the proceedings, including his trial, motion for new trial, appeal, nor in his various post conviction motions, until the filing of the petition now before the court.

The district court, relying on *Shotwell Mfg. Co.* v. *United States*, 371 U.S. 341, concluded that petitioner had waived his right to object to the composition of the

grand jury because this was a contention that, under Rule 12(b)(2), of the Federal Rules of Criminal Procedure, is waived unless raised by motion prior to trial (A. 19–23). The court further concluded that there was nothing in the facts of the case or in the nature of the claim justifying the exercise of the court's power under Rule 12(b)(2) to "grant relief" from the waiver for "cause shown." In so ruling, the court noted that the system for selection of grand jurors had been openly followed for many years prior to petitioner's indictment, that the same grand jury that indicted petitioner indicted his two white accomplices, and that the case against him was "a strong one" (A. 24–25).

On appeal, the court below affirmed on the basis of *Shotwell* and Rule 12(b)(2) (A. 33–34), finding that any objection to the composition of the grand jury had been waived.[6] In denying petitioner's motion for rehearing, the court independently found, as had the district court, that no oral pre-trial motion challenging the grand jury had been made (A. 36–37, note 1).[7]

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[6] The court had previously rejected an identical claim raised by a co-defendant of petitioner who had pleaded guilty. See *Throgmartin v. United States*, 424 F. 2d 630 (C.A. 5).

[7] Although raised in his petition for a writ of certiorari as a question presented, petitioner apparently no longer challenges the findings of the two courts below, made without a hearing, that he did not in fact make any pre-trial challenge to the selection of the grand jury and thus that the waiver provision of Rule 12(b)(2) is, by its terms, applicable to this case. Section 2255 allows a court to dispense with an evidentiary hearing when "the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief * * *."

SUMMARY OF ARGUMENT

A

Rule 12(b)(2) of the Federal Rules of Criminal Procedure provides that "[d]efenses and objections based on defects in the institution of the prosecution or in the indictment or information" may be raised "only by motion before trial," and that the failure to raise the "defenses or objections" as provided "constitutes a waiver thereof" (but the court "for cause shown" may grant relief from the waiver). The Advisory Committee Notes, the comments of the draftsmen, and the construction and application Rule 12(b)(2) by this Court and the courts of appeals, confirm what the language of Rule 12(b)(2) makes plain, that its waiver provisions apply to objections to the method of selecting grand jurors.

B

Petitioner was tried and convicted of illegally entering a federally insured bank with intent to commit

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That authority was properly invoked here. See *Machibroda* v. *United States*, 368 U.S. 487, 494–495; *Sanders* v. *United States*, 373 U.S. 1, 19–21. See also *Burris* v. *United States*, 430 F. 2d 399 (C.A. 7), certiorari denied, 401 U.S. 921.

Moreover, the court of appeals stated that it too had "carefully examined all the files, record and supplementary records, as well as the transcript of testimony in this matter" and found that there "is no mention therein of a motion, oral or written, challenging the Grand Jury array". The court thus concluded: "The contention is raised for the first time, in this Section 2255 proceeding" (A. 36). In accordance with the "salutary" rule of practice, "to be followed where applicable", this Court "does not lightly overturn the concurrent findings of fact of two lower federal courts * * *." *Neil* v. *Biggers*, No. 71–586, decided December 6, 1972 (Slip op. p. 4, n. 3). That rule is fully applicable here.

larceny in violation of 18 U.S.C. 2113(a). The evidence against him was overwhelming and uncontroverted. Although he was represented by diligent and able defense counsel, and although petitioner himself was not a young and inexperienced defendant, no challenge was made at or before trial or on direct appeal to the methods employed in the selection of the grand jury that indicted him. Despite the clear requirements of Rule 12(b)(2), petitioner and the Amicus Curiae argue that failure to comply with "procedural rules will not in and of itself result in a waiver" of the right to object to the composition of the grand jury, and that petitioner may assert this claim three years after his trial and conviction, when retrial may no longer be possible. Petitioner places principal reliance for this proposition on *Kaufman* v. *United States*, 394 U.S. 217, which he asserts holds absolutely and unequivocally that the claim he raises here is not waived by his failure to assert it at or before trial, and may always be heard on collateral review.

Kaufman v. *United States*, however, did not involve the application of the express waiver provisions of Rule 12(b)(2). The case turned principally on the language of the federal habeas corpus statute (Section 2255 of the Judicial Code for federal prisoners). The only basis for the claim of waiver asserted there was a limitation inherent in the nature of the writ of habeas corpus—*i.e.*, that the writ could not be issued where the petitioner had failed to assert the claim on appeal. The rejection of that argument turned on the construction of the general provisions

of the habeas corpus statute which were construed to have "expanded" the scope of the writ to permit relief in all cases where the petitioner is restrained of his or her liberty in violation of the Constitution.

The general provisions of the habeas corpus statute, however, must be read alongside the specific provisions of the Federal Rules of Criminal Procedure, not discussed in *Kaufman*. Rule 12(b)(2) does not simply afford "a procedure" for asserting an objection to the composition of the grand jury. Rather, it requires that such an objection must be timely raised or is waived. The provisions of the Federal Rules of Criminal Procedure, promulgated by this Court and accepted by Congress, are explicitly given the force of law, modifying *pro tanto* any laws inconsistent with them (18 U.S.C. 3771). Under well established canons of statutory construction, Rule 12(b)(2) governs the timeliness of asserting the kind of objection petitioner here asserts. Accordingly, cases construing the reach of the habeas corpus statute, such as *Kaufman* v. *United States, supra,* and *Fay* v. *Noia*, 372 U.S. 391, are inapplicable here, because the express waiver provision of Rule 12(b)(2), not involved in such cases, limits the non-jurisdictional claims that can be raised for the first time on collateral attack.

We do not argue here that this Court may promulgate a rule, or that Congress may enact a statute, barring collateral relief on all claims not timely asserted without regard to the effect of the alleged constitutional violation on a defendant's right to a fair trial or the reasons for the failure to make a timely objection. But Rule 12(b)(2) is not such a

broad and unyielding provision. The Rule does not apply to objections or defenses which go to the fairness of the guilt determining processes or which affect the trial in any way. Rather it is applicable only to objections based on defects in the institution of the prosecution or in the indictment," objections such as that at issue here, which if timely asserted can be rectified.

A "waiver" provision is peculiarly appropriate to such defenses, because a defendant generally has little to gain by making a timely objection. While an objection to the admissibility of evidence will result in its permanent suppression, an objection to a defect in the institution of the proceeding will generally result only in a new indictment. Thus, without the risk of waiver, there is great incentive for a defendant to delay his objection in the hope of an acquittal, and assert the objection only as another basis for upsetting a valid judgment of conviction.

Rule 12(b)(2) permits a district court judge to grant relief from the waiver provisions for "cause shown." The record is uncontroverted here that with due diligence the claims advanced here could have been discovered and asserted before trial, and that "cause" has not been shown by petitioner for the failure to make a timely objection. The denial of the petition was therefore justified.

C

Similar considerations would also warrant denial of the petition even if Rule 12(b)(2) were not applicable. Under the habeas corpus statute, the dis-

trict court has discretion to deny collateral relief in appropriate circumstances. While the cases generally limit the discretion to deny relief to instances where the prisoner knowingly and deliberately by-passed the procedure for asserting his claim at trial or on appeal, the cases applying that standard involve errors of constitutional dimension which have a direct bearing on the prisoner's guilt or innocence, or the fairness of the trial. In the instant case, petitioner's claim does not in any way affect the determination of guilt or innocence, but alleges only a curable defect in the initiation of the proceeding. Given the nature of the claim, the three year delay before the petition was filed, the absence of any excuse for the delay, as well as the lack of any possible prejudice, the district court would be warranted in exercising its discretion to deny the petition, without regard to the express waiver provision of Rule 12(b)(2). When, along with these facts, it is not alleged that there was deliberate exclusion of Negroes from the petit jury, and since the system used for the selection of jurors, which petitioner attacks, has been replaced, the exercise of the court's discretion to reject the collateral motion is compelling.

ARGUMENT

INTRODUCTION AND BACKGROUND

This case involves the right of a federal prisoner to complain for the first time in a collateral proceeding under 28 U.S.C. 2255, several years after his conviction, about the alleged exclusion of Negroes from the

federal grand jury which had returned the indictment on which he was found guilty by a petit jury whose selection he does not challenge. In resolving this question, the Court may find it helpful to consider the context in which the question arises in this case, and which an evidentiary hearing was not needed to develop.

1. When petitioner was indicted in the Northern District of Mississippi in 1968, jury selection was governed by the Civil Rights Act of 1957, 71 Stat. 635, *et seq.* in which Congress adopted uniform federal jury qualifications but left jury selection largely to the discretion of the court clerk and a jury commissioner appointed by the district court. As petitioner alleges, the "key man" system was employed in the selection of grand jurors. Under this system, which was employed in "[m]ost federal jurisdictions" prior to the adoption of the Jury Selection and Service Act of 1968 (28 U.S.C. 1861–1869), and which was expressly approved by this Court in *Scales* v. *United States*, 367 U.S. 203, 259,* "key men" who are "thought to have extensive contacts throughout the community, supply the names of prospective jurors" to the clerk and jury commissioner (H. Rep. No. 1076, 90th Cong., 2d Sess. n. 1). The use of the system, as the Amicus Curiae acknowledges, "has not * * * by and large [resulted in] deliberate exclusion of blacks" (Br. 19), but has instead on occasion resulted in "unintentional" under-representation of Negroes and other

* See, also *United States* v. *Hoffa*, 349 F. 2d 20, 29 (C.A. 6), and cases cited, affirmed, 385 U.S. 293.

groups on jury lists. See, *e.g.*, *Rabinowitz* v. *United States*, 366 F. 2d 34 (C.A. 5); H. Rep. No. 1076, supra; S. Rep. No. 891, 90th Cong., 1st Sess.[9] Because of this under-representation, the 1968 Jury Selection Act provided that each district court must adopt a plan for jury selection that includes detailed procedures designed to ensure the random selection of a fair cross section of the persons residing in the community in which the court convenes.

2. The manner in which grand and petit jurors were selected under the "key man" system in the Northern District of Mississippi was detailed by the clerk of the district court to the Senate Judiciary Subcommittee on Improvements in Judicial Machinery (see Hearings on S. 383, 90th Cong., 1st Sess. 993-996), and in an affidavit filed in response to an attack on the method of grand jury selection in that district by a defendant indicted by the same grand jury that indicted petitioner (*United States* v. *Polk*, N.D. Miss., No. CR.D. 6824, affirmed, 433 F. 2d 644 (C.A. 5)).[10]

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[9] 18 U.S.C. 243, originally enacted in 1867, makes it an offense for any person "being an officer or other person charged with any duty in the selection or summoning of jurors," to exclude or fail to summon any citizen for duty as a grand or petit juror "on account of race, color, or previous condition of servitude . . . ."

[10] The defendants in *Polk* were originally indicted in 1968 and by timely pre-trial motions challenged the composition of the grand jury that returned that indictment on the ground of systematic exclusion of women and Negroes. A superseding indictment in the *Polk* case was returned in September 1968 and, by stipulation and order, the motion challenging the composition of the grand jury was directed to the new grand jury. This grand jury was the same one which had indicted petitioner in 1968. The government responded with affidavits of the

The Clerk, in answer to the Committee's questionnaire, said that he gave the following instructions to the "key men" (Hearings, *supra*, p. 994): "I tell them that I need names of males and females, white and non-white." Once the names of the potential grand and petit jurors were obtained, they were divided into four "wheels" for selection of petit jurors by divisions within the district; a combined list from all four divisions was placed in a fifth wheel for selection of grand jurors. This difference accounts for petitioner's challenge only to the grand jury rather than to the petit jury which convicted him (see Petitioner's Response to the Opposition to the Petition for Certiorari, p. 3). Under this system the proportion of blacks represented on the four petit juror lists would not necessarily be the same as on the district wide grand jury list.

3. We reiterate at this introductory juncture that the present case does not involve a challenge to the composition of the petit jury that found petitioner guilty beyond a reasonable doubt, nor does it involve outright exclusion of Negroes from the grand jury that decided that he and his two white co-defendants

clerk of the district court and of numerous practicing attorneys in the Northern District of Mississippi showing that blacks were represented on juries in significant numbers. Subsequently, a stipulation was entered into between the defendants and the prosecutor that the challenge would be limited solely to the exclusion of women and that the challenge based on the exclusion of Negroes was specifically withdrawn. We are lodging with the Clerk the pleadings and affidavits filed in the Polk case, which are appropriate subjects of judicial notice. See Rules 201(b)(2), (d), and (f) of the new Federal Rules of Evidence, which codify the prevailing practice.

had to stand trial. The challenge is to a method of selection—now superseded by other statutory procedures—which may have resulted in under-representation of blacks on grand juries. These facts, as we show, are significant in determining whether the district court could in the exercise of its discretion under Rule 12(b)(2) and 28 U.S.C. 2243, decline to permit petitioner to challenge an otherwise valid judgment of conviction, three years after his trial, where the issue was not timely raised, where the error does not involve the guilt determining process, but only a defect in the institution of the proceeding, and where the composition of the grand jury that indicted him could not possibly have affected its decision to accuse him.

THE ABSENCE OF A TIMELY PRETRIAL OBJECTION TO DEFECTS IN THE INSTITUTION OF THE PROSECUTION OR INDICTMENT AS REQUIRED BY RULE 12(b)(2) OF THE FEDERAL RULES OF CRIMINAL PROCEDURES BARS COLLATERAL ATTACK BASED UPON THE CLAIM THAT NEGROES WERE EXCLUDED FROM THE GRAND JURY, UNLESS THERE IS "CAUSE SHOWN" FOR GRANTING "RELIEF FROM THE WAIVER".

Unless this Court holds Rule 12(b)(2) of the Federal Rules of Criminal Procedure unconstitutional, the decision below must be sustained. Rule 12(b)(2) provides that "defenses and objections based on defects in the institution of the prosecution or in the indictment"—other than that the indictment fails to show jurisdiction in the court or to charge an offense—"may be raised *only* by motion before trial" (emphasis added). The Rule also requires that the "motion shall

include all such defenses and objections then available to the defendant." The Rule then expressly establishes that "[f]ailure to present any such defense or objection as herein provided constitutes a waiver thereof," except that "the court for cause shown may grant relief from the waiver." The plain wording of this Rule is applicable to all defenses including alleged constitutional defects in the institution of an indictment, as this Court has ruled and as the history of the Rule indicates. The Rule, therefore, by its terms required the rejection of petitioner's collateral claim, once the courts below found that there was no sufficient "cause" to relieve him from the effect of the waiver.

A. UNDER RULE 12(b)(2), ALL DEFECTS IN THE INSTITUTION OF THE INDICTMENT, INCLUDING CONSTITUTIONAL DEFECTS, ARE WAIVED UNLESS RAISED BEFORE TRIAL.

1. In *Shotwell Mfg. Co.* v. *United States*, 371 U.S. 341, 362, the defendants attacked the composition of the grand jury and petit jury for the first time in a post-conviction motion made four years after their trial and conviction. They alleged *inter alia* that their "constitutional rights" were violated because the method used in the selection of grand and petit juries failed to secure a cross-section of the population (371 U.S. 361–362). The district court held a hearing to determine whether "cause" was shown warranting relief from the waiver operative under Rule 12(b)(2). The district court found "that the facts concerning the selection of the grand and petit juries were notorious and available to petitioners in the exercise of

due diligence before trial, [since] [t]he same method of selecting jurors had been followed by the clerk and the jury commissioner for years" (371 U.S. at 363). The failure of the defendants to exercise "due diligence" combined with the fact "that petitioners were not prejudiced in any way by the alleged illegalities in the selection of the juries" (371 U.S. at 363) was held to preclude the defendants from raising the issue four years after the trial.

The court of appeals affirmed the finding of the district court, and this Court affirmed the application of the waiver provisions of Rule 12(b)(2), holding (371 U.S. 362):

> We think, as the two lower courts did, that petitioners have lost these objections by years of inaction. * * *

The holding in *Shotwell* governs this case. The attack on the grand jury here came three years after petitioner's trial. The district court found "no plausible explanation of his failure to timely make his objection" and thus refused to disregard the waiver of the objection. (A. 24-25):

> The method of selecting grand jurors then in use was the same system employed by this court for years. No reason has been suggested why petitioner or his attorney could not have ascertained all of the facts necessary to present the objection to the court prior to trial. The same grand jury that indicted petitioner also indicted his two white accomplices. The case had no racial overtones. The government's case against petitioner was, although largely

> circumstantial, a strong one. There was certainly sufficient evidence against petitioner to justify a grand jury in determining that he should stand trial for the offense with which he was charged. * * * The government did not require the assistance of racial prejudice in order to obtain an indictment against petitioner, and indeed petitioner does not contend that any such prejudice existed. * * *

These findings which are not challenged here warranted the rejection of petitioner's untimely challenge to the method of selecting the grand jury.

2. Petitioner, recognizing "the apparent obstacles presented by Rule 12(b)(2) F.R.Crim.P., and *Shotwell Mfg. Co.* v. *United States,* 371 U.S. 341" (Br. 17), seeks to distinguish the instant proceeding from *Shotwell* on several grounds: (1) that the "concession" of the defendants in *Shotwell* that Rule 12(b)(2) applied to objections to the grand jury array "deprived this Court of any adversarial perspective on the issue and cannot be deemed conclusive against petitioner here" (Br. 18); (2) that the Court in *Shotwell* said that "both courts below have found that petitioners were not prejudiced in any way by the alleged illegalities in the selection of the grand juries", while "[i]n the case at bar prejudice is presumed" (Br. 20); (3) that "the trial court in *Shotwell* held a hearing on the objections to the jury" and the "waiver finding was only an alternative basis for [the] decision" (Br. 20); and (4) that "the objections to the array in *Shotwell* * * * did not rise to the dimension of the fundamental constitutional right

asserted by petitioner at bar" (Br. 18–19). These arguments cannot be reconciled with the opinion in *Shotwell*.

First, although the defendants in *Shotwell* conceded that the challenge to the composition of the grand jury was barred by their failure to comply with Rule 12(b)(2), they expressly contested its application to their challenge to the petit jury; but with the benefit of that "adversarial perspective," the Court nevertheless held that *both* such claims were barred by Rule 12(b)(2) (371 U.S. at 362). The present case follows *a fortiori*. While the ultimate fact finding functions served by the petit jury might have warranted a less restrictive application of the requirements of Rule 12(b)(2), when the challenge is to the selection of the trial jury,[11] the application of the Rule even to those challenges leaves no room for argument that *Shotwell* is "not conclusive" against petitioner's belated objections to the method of selecting the grand jury here.

Second, equally without merit is petitioner's claim that this case is distinguishable from *Shotwell* because prejudice need not be shown here in order to entitle petitioner to relief. This claim was made and rejected in *Shotwell*. There, relying upon *Ballard* v. *United States*, 329 U.S. 187, a jury discrimination case, the defendants argued that their claim regarding the methods employed in selecting the jury did "not depend on a showing of prejudice in an indi-

[11] See, *e.g.*, *Witherspoon* v. *Illinois*, 391 U.S. 510, 519–523; *Duncan* v. *Louisiana*, 391 U.S. 145, 155–156; *Williams* v. *Florida*, 399 U.S. 78, 100.

vidual case" (329 U.S. at 195). The Court agreed that where the challenge is *timely* raised no showing of prejudice is required (371 U.S. at 363):

> However, where, as here, objection to the jury selection has not been timely raised under Rule 12(b)(2), it is entirely proper to take absence of prejudice into account in determining whether a sufficient showing has been made to warrant relief from the effect of that Rule.

Reliance on *Peters* v. *Kiff*, 407 U.S. 493, to avoid this aspect of *Shotwell* and to assert that "prejudice is presumed" (Br. 20) is misplaced. In *Peters*, the question was whether a white man could seek federal habeas corpus relief by asserting that Negroes had been systematically excluded from the state grand jury and petit jury that considered his case. There was no opinion for the Court; three Justices dissented on the ground that no prejudice was alleged or shown; and three Justices who concurred in the judgment allowing relief did so on the narrow ground (407 U.S. at 507) that to allow the claim to be raised even by a white defendant "would implement the strong statutory policy" of the federal Civil Rights Laws (18 U.S.C. 243 *supra*, p. 18, n. 9). Nothing was said or done to undercut the continuing vitality of the holding in *Shotwell* that the absence of any factual prejudice is relevant in determining whether a federal prisoner seeking collateral review should be relieved from the waiver of a challenge to grand jury selection.

Third, there is no basis for petitioner's claim that because the trial court in *Shotwell* held a hearing on the objection to the jury, "the waiver finding was

only an alternative basis for decision." The hearing held by the trial court, to which the *Shotwell* opinion alluded (371 U.S. at 363), related to whether facts could be adduced to warrant the exercise of the district court's discretion to "grant relief from the waiver" (371 U.S. at 362). Because this Court found that the district court had properly applied the waiver provision of Rule 12(b)(2), it expressly refrained from reaching the merits of the jury-selection claim, despite the fact that the merits were raised and argued in the briefs (371 U.S. at 364):

> We need express no opinion on the propriety of the practices attacked. It is enough to say that we find no error in the two lower courts' holding that the objection has been lost.

This plainly refutes any argument that the waiver holding was dictum.

Fourth and finally, while the Court in *Shotwell* did not reach the merits of the challenge to the jury selection procedures, the Court obviously accepted at face value the defendants' claim that the case involved more than mere irregularities in the method of selection of grand jurors, and that just as here, their "constitutional rights" (371 U.S. at 362–363) had allegedly been violated.

Both in *Shotwell* and here, the requirements of Rule 12(b)(2) were properly applied to foreclose, as waived, a challenge to the grand jury selection that could have been timely raised but was not. The Advisory Committee Notes show beyond dispute that Rule 12(b)(2) was intended to apply to the kind of challenge to the grand jury asserted here:

> These two paragraphs classify into two groups all objections and defenses to be interposed by motion prescribed by rule 12(a). In one group are defenses and objections which must be raised by motion, failure to do so constituting a waiver. * * *
>
> In [this group] are included all defenses and objections that are based on defects in the institution of the prosecution or in the indictment and information, other than lack of jurisdiction or failure to charge an offense. * * * Among the defenses and objections in this group are the following: *Illegal selection or organization of the grand jury,* disqualification of individual grand jurors, presence of unauthorized persons in the grand jury room, other irregularities in grand jury proceedings. * * * The provision that these defenses and objections are waived if not raised by motion substantially continues existing law, as they are waived at present unless raised before trial by plea in abatement, demurrer, motion to quash, etc. [18 U.S.C.A. (F.R. Crim. P., Rules 1–14), p. 607; emphasis added.]

There can be no claim that the waiver provisions were to be applicable to mere "irregularities in grand jury proceedings" not involving constitutional questions. The Advisory Committee Notes to the preliminary drafts, containing detailed discussions of Rule 12(b)(2), included a table (Table II) illustrating the defects "in the institution of the prosecution" intended to be covered by the Rule. Among the illustrative cases were those involving claims that Negroes were unconstitutionally excluded from grand juries.

See Federal Rules of Criminal Procedure Preliminary Draft (1943), p. 57, and Second Preliminary Draft (1944), p. 51. See, also, Preliminary Draft (1943) p. 68, citing *United States* v. *Gale*, 109 U.S. 65, 67, a jury discrimination case in which the claim was barred by failure to make a timely objection, as illustrative of the prevailing common law waiver rule. See, also, *Michel* v. *Louisiana*, 350 U.S. 91, 99. Moreover, the law was then settled that a failure to assert such constitutional claims seasonably in accordance with applicable procedural rules operated to bar collateral relief. See, *e.g.*, *Brown* v. *Allen*, 344 U.S. 443, 485–486.

Accordingly all but one of the courts of appeals which have considered the issue have held that the failure to make a timely challenge to the array of the grand jury, on racial or other grounds, constitutes a waiver of the objection unless good cause is shown for the failure to comply with Rule 12(b)(2). See *United States* v. *Williams*, 421 F. 2d 529, 532 (C.A. 8); *Moore* v. *United States*, 432 F. 2d 730, 740 (C.A. 3, *en banc*); *Bustillo* v. *United States*, 421 F. 2d 131 (C.A. 5); *Poliafico* v. *United States*, 237 F. 2d 97 (C.A. 6), certiorari denied, 352 U.S. 1025; *Juelich* v. *Harris*, 425 F. 2d 814 (C.A. 7).[12]

[12] The one exception is the Ninth Circuit's decision in *Fernandez* v. *Meier*, 408 F. 2d 974, upon which petitioner (Br. 23) and the Amicus Curiae (Br. 14) rely. The court of appeals there conceded that "Rule (12)(b), *supra*, would require us to hold that failure [of defendant] to present his claim [of exclusion of Spanish Americans from the grand *and* petit juries] as therein required 'constitutes a waiver thereof'" (408 F. 2d 977). The court of appeals, however, relying on *Fay* v. *Noia*, 372 U.S. 391, and *Sanders* v. *United States*, 373 U.S.

The Advisory Committee Notes, the application of the Rule in *Shotwell*, and the consensus of the courts of appeals combine to refute petitioner's assertion that Rule 12(b)(2) is not applicable to the claim asserted here.

B. THE FEDERAL HABEAS CORPUS STATUTE AND THE CASES CONSTRUING IT DO NOT GOVERN THIS CASE

Petitioner's contention that "[t]his case is controlled by *Kaufman* v. *United States*, 394 U.S. 217" (Br. 10) ignores the crucial distinctions between the two cases. In *Kaufman* the defendant, who was tried and convicted of bank robbery, sought collateral relief alleging that illegally seized evidence had been admitted against him at trial, over a timely objection (394 U.S. 220, n. 3), and that this evidence resulted in the rejection of his only defense to the charge. The district court and the court of appeals denied the application on the ground that this claim was not raised on appeal from the judgment of conviction and, "that a motion under § 2255 cannot be used in lieu of an appeal" (394 U.S. 223).

The majority of this Court in *Kaufman* held that this construction of 28 U.S.C. 2225 was inapplicable to constitutional claims (394 U.S. 227), and that collateral relief under 28 U.S.C. 2255 was not barred

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1, held that despite the provisions of Rule 12(b)(2), which were plainly applicable, collateral relief could be denied under 28 U.S.C. 2255 only upon a showing of a "knowing and deliberate by-pass" of a timely objection. We shall show below, pp. 29–37, that reliance on cases which did not involve Rule 12(b)(2), and which turned solely on the application of the habeas corpus statute (28 U.S.C. 2241, *et seq.*) is not justified.

by the defendant's failure to assert the claim on appeal."

The first and most obvious distinction is that *Kaufman* involved a claim that the applicant had been convicted on the basis of unconstitutionally seized evidence. Here, however, without in any way minimizing the importance of insuring that grand juries are selected without racial discrimination, petitioner's collateral claims do not relate to the trial itself, or to the fairness and accuracy of the guilt-finding process, and thus the need to preserve post-conviction remedies to vindicate his (alleged) rights is not nearly as strong.

But beyond this factor, *Kaufman* did not involve the application of the express waiver provisions of Rule 12(b)(2). The case turned principally on the language of the federal habeas corpus statute (Section 2255 of the Judicial Code, for federal prisoners). The only basis for the claim of waiver asserted there was a limitation inherent in the nature of the writ of habeas corpus—*i.e.*, that the writ could not be asserted where the prisoner had failed to assert the claim on appeal. See *e.g.*, *Sunal* v. *Large*, 332 U.S. 174, 179; *Brown* v. *Allen*, 344 U.S. 443,–487. The rejection of that argument in *Kaufman* and *Fay* v. *Noia*, *supra*, turned on the construction of the provisions of 28 U.S.C. 2254, enacted in 1867, which the court concluded had "expanded" the writ of habeas corpus to authorize collateral relief in "all cases where any per-

"Five Justices joined in the Court's opinion. Justices Black, Harlan, and Stewart dissented. Justice Marshall took no part.

son may be restrained of his or her liberty in violation of the constitution * * *" (*Kaufman* v. *United States*, *supra*, 394 U.S. at 221, quoting Act of February 5, 1867, c. 28, § 1, 14 Stat. 385, now 28 U.S.C. 2254).[14] The applicant in *Kaufman* alleged that he was "restrained in violation of the constitution"; and the Court found no basis for withholding the remedy, simply because the claim was not asserted on appeal, where the record clearly indicated that there was not a knowing and deliberate bypass of the procedures provided by way of appeal.[15]

The general provisions of the habeas corpus statute, however, must be read alongside the specific provisions of the Federal Rules of Criminal Procedure, not discussed in *Kaufman*. Rule 12(b)(2) does not simply afford "a procedure" for asserting an objection to the composition of the grand jury. The Rule, which has

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[14] The common law principles which initially determined the scope of the writ (394 U.S. at 221) precluded collateral attack on a valid judgment of conviction. "[A]t common law a judgment of conviction rendered by a court of general criminal jurisdiction was conclusive proof that the confinement was legal * * * [and] prevented issuance of the writ without more." *United States* v. *Hayman*, 342 U.S. 205, 211. See, also, Oaks, *Legal History in the High Court—Habeas Corpus*, 64 Mich. L. Rev. 451, 452–456, 461–468 (1966); Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 145, n. 18, 170–172 (1970); Mayers, *The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian*, 33 U. Chi. L. Rev. 31, 56–57 (1965). Cf. *Fay* v. *Noia*, 372 U.S. 391, 405, noting the existence of "respectable authority" for a contrary view.

[15] The "deliberate by-pass rule" is likewise based on the Court's construction of the effect of the habeas corpus statute. *Fay* v. *Noia*, *supra*, 372 U.S. 438–439; see *infra*, pp. 37–39.

the force and effect of a statute,"[*] expressly states that the failure to raise timely objections regarding defects in the institution of the proceedings "constitutes a waiver thereof." Having been promulgated by this Court and "adopted" by Congress (*Singer* v. *United States*, 380 U.S. 24, 37), under well established canons of statutory construction, it is plain that Rule 12(b)(2) provides the sole and exclusive remedy for violations of the rights asserted by petitioner here and *pro tanto* modifies the statutory "expansion" of the grounds on which collateral relief could otherwise have been sought. See *Bulova Watch Co.* v. *United States*, 365 U.S. 753, 758, and cases cited; *United States* v. *Kras*, No. 71–749, decided January 10, 1973, slip op. p. 6.

We are not suggesting that this Court may promulgate a rule, or that Congress may enact a statute, barring collateral relief in all circumstances where a claim of constitutional dimension was not asserted at or before trial. A statute or rule which failed to take

[*] 18 U.S.C. 3771, formerly 18 U.S.C. (1940 ed.) 687, provides that upon taking effect, after submission to Congress, "[a]ll laws in conflict with such rules shall be of no further force and effect * * *." See *Sibbach* v. *Wilson & Co.*, 312 U.S. 1, 10, holding that the Federal Rules of Civil Procedure operated to "repeal [an inconsistent] statute"; *Dupoint* v. *United States*, 388 F. 2d 39, 44 (C.A. 5), holding that the Federal Rules of Criminal Procedure "have the force and effect of law. Just as a statute, * * * [they] must be obeyed." *Accord: Hanna* v. *Plumer*, 380 U.S. 460, 471; *United States* v. *Weinstein*, 452 F. 2d 704, 715, certiorari denied *sub nom. Gruneberger* v. *United States*, 405 U.S. 917; *Winsor* v. *Daumit*, 179 F. 2d 475, 477 (C.A. 7); *John R. Allen & Co.* v. *Federal Nat. Bank*, 124 F. 2d 995 (C.A. 10); *American Federation of Musicians* v. *Stein*, 213 F. 2d 679 (C.A. 6), certiorari denied, 348 U.S. 873.

account of the reasons for failure to assert the claim, or of the nature of the constitutional claims asserted, might encounter problems under the Due Process Clause or the Suspension Clause. But neither on its face nor as applied to the present case is Rule 12(b)(2) an overly broad or unduly inflexible requirement. The Rule applies to challenges to the commencement of the proceeding that are "then available", and provides that a tardy defendant can be relieved from the waiver of such challenges if there is "cause' to do so. This procedural requirement is reasonably calculated to protect a defendant's legitimate interests while at the same time encouraging him to assert any challenges to pretrial proceedings before the trial, when they can be determined and cured, rather than years later, after the government, the court, and the witnesses have gone to the burden and expense of trial, and when retrial may be practically impossible.[11]

The express waiver provisions of Rule 12(b)(2) do not purport to apply to all constitutional claims, but only to claims "based on defects in the institution of the prosecution or in the indictment." Such claims, unlike claims relating to the admissibility of evidence involved in *Kaufman*, generally have no effect on the process by which guilt or innocence is determined and more significantly are capable of being easily cured. While nothing can undo an illegal search or a coerced

[11] As the Court aptly observed in *Barker* v. *Wingo*, 407 U.S. 514, 521: "As the time between the commission of the crime and trial lengthens, witnesses may become unavailable or their memories may fade. If the witnesses support the prosecution, its case will be weakened, sometimes seriously so."

confession, defects in the indictment and institution of the proceedings can be cured by a new indictment procured in the proper manner. The practical effect of a "waiver" provision is, therefore, peculiarly appropriate to such claims, since there is generally little incentive to raise objections involving defects in the indictment or institution of the prosecution before trial. A successful attack merely results in a new indictment.

Nor is there any constitutional impediment to a waiver rule applicable in cases like this one. This Court has already rejected arguments that due process prevents establishment of a rule declaring challenges to the grand jury waived unless timely raised. In *Michel* v. *Louisiana*, 350 U.S. 91, the Court held that three Negro defendants charged in state courts could be barred from asserting that Negroes had been systematically excluded from the grand juries that indicted them, because they had failed to comply with a state statute requiring such challenges to the grand jury to be raised within three days after the grand jury term expired or before arraignment. There, as in the present case, the Court noted that there was no attack on the composition of the petit jury or on the fairness of the trials (350 U.S. at 93). The Court held: "It is beyond question that under the Due Process Clause * * * Louisiana may attach reasonable time limitations to the assertion of federal constitutional rights. More particularly the State may require prompt assertion of the right to challenge discriminatory practices in the make-up of

a grand jury" (350 U.S. at 97; footnote omitted). And, anticipating its later holding in *Shotwell, supra*, the Court noted: "Even in federal felony cases where, unlike state prosecutions, indictment by a grand jury is a matter of right, this Court has strictly circumscribed the time within which motions addressed to the composition of the grand jury may be made," citing Rule 12(b)(2) (350 U.S. at 99).[18]

Without the deterrent effect of a waiver provision, there is every incentive for a defendant to delay the claim in the hope of an acquittal, and to assert the claim only as another ground for upsetting an otherwise valid conviction, perhaps thereby achieving immunity for the crime because of the effect of delay on the ability to re-indict or reprosecute. The incentive is particularly great if, as petitioner claims, no prejudice need be shown. The instant case is illustrative. Had petitioner asserted his claim prior to trial, and had it resulted in dismissal of the indictment after appropriate proceedings, the only consequence would have been, as the courts below noted, a fresh indictment by a differently constituted grand jury.

Although an absolute waiver rule might thus be justified, Rule 12(b)(2) does not go so far. Rather, it vests discretion in the district court to grant relief

[18] See also, *Henry* v. *Mississippi*, 379 U.S. 443, 448 (indicating that failure to comply with a state rule requiring contemporaneous objection to the introduction of allegedly illegal evidence serves a legitimate governmental interest and may bar review of the underlying claim); *Williams* v. *Florida*, 399 U.S. 78, 80–82 (upholding a state notice-of-alibi rule, requiring the defense to notify the prosecution before trial of prospective alibi witnesses precluded from introducing their testimony).

from the waiver on a showing of "cause". Where the defect could not have been discovered through the exercise of "due diligence" (*Shotwell* v. *United States*, *supra*), or where the defendant was not represented by counsel, or was prevented by some "incapacity, or some interference by officials" (cf. *Brown* v. *Allen*, *supra*, 344 U.S. at 485–486), it might well be an abuse of discretion, if not a violation of due process, to deny relief from the waiver provisions of Rule 12(b)(2). Here, as both courts below found, no justification has been advanced for non-compliance with Rule 12(b)(2), and no prejudice has been shown. Thus, the application of the waiver provisions was plainly warranted.

The court of appeals decisions, cited by petitioner (Br. 25–28), which have granted relief in the face of state common law or statutory procedural rules similar to Rule 12(b)(2), are inapposite here. While as this Court held in *Fay* v. *Noia*, 372 U.S. 391, under the Supremacy Clause, "[s]tate procedural rules plainly must yield to * * * [the] overriding federal policy" that the Court found was expressed in the federal habeas corpus statute (372 U.S. at 426–427), Rule 12(b)(2) was promulgated by this Court and accepted by Congress, and thus sets forth the "overriding federal policy" as far as the claims asserted here by this federal prisoner (see *supra*, pp. 31–32 and n. 16; cf. *United States* v. *Singer*, 380 U.S. 24, 36–37); *Hanna* v. *Plumer*, 380 U.S. 460, 471).[18]

[18] Moreover, the cases cited by petitioner (Br. 25–28), involved challenges to the petit jury as well as the grand jury. See, *e.g.*, *United States ex rel Goldsby* v. *Harpole*, 263 F. 2d 71, 83–84 (C.A. 5), certiorari denied, 361 U.S. 838, holding that the

For similar reasons, the standard for holding petitioner to have waived his claim cannot be the one he advances (see Br. 21–23)—that of a "knowing" and "deliberate by-pass" by petitioner personally. That standard, drawn from the habeas corpus statute (see *infra*, pp. 38–39), and wholly inconsistent with the language, history and interpretation of Rule 12(b)(2), would virtually nullify the provisions of the Rule. For it must be recognized that, while competent counsel will thoroughly review with his client the basic factual issues in the case and his general trial strategy, the constitutional right to legal counsel presupposes that the basic operative judgment on what procedural and legal objections should be made must be essentially the professional judgment of the lawyer. As Justice Harlan pointed out in his dissenting opinion in *Fay* v. *Noia*, *supra*, 372 U.S. at 471, willingness to respect only those waivers made by the "defendant himself expressly" in a case in which he is represented by competent counsel "is to undermine the entire representa-

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defendant's failure to comply with a state procedural rule barred a collateral challenge to the grand jury, but not the petit jury. Cf. *Henderson* v. *Tollet*, 459 F. 2d 237 (C.A. 6), certiorari granted, October 10, 1972, No. 72-95, and *Winter* v. *Cook*, 466 F. 2d 1393 (C.A. 5), cited by petitioner (Br. 26). In *Parker* v. *North Carolina*, 397 U.S. 790, 798, decided after *Fay* and *Kaufman*, the Court left open the question whether a claim challenging the racial composition of a state grand jury could be raised in a federal habeas corpus proceeding where the defendant failed to comply with a state procedural rule similar to Rule 12(b)(2). Contrary to petitioner's claim *Peters* v. *Kiff*, *supra*, which involved a challenge to both petit and grand juries did not resolve the issue (see, *infra*, pp. 40–42, nn. 21–22).

tional system." That comment is especially apt here where on appeal from petitioner's conviction, the court of appeals underscored the exceptionally "thorough" and "unstinted" representation petitioner received from his "able counsel" (409 F 2d at 1101). We submit that it cannot be the law that Rule 12(b)(2) is of no force and effect unless the government shows that counsel fully discussed this particular claim with petitioner, and that petitioner himself "knowingly" and "intelligently" decided that there were no sufficient constitutional grounds to make it.

C. DENIAL OF THE WRIT OF HABEAS CORPUS WOULD BE JUSTIFIED EVEN UNDER THE FEDERAL HABEAS CORPUS STATUTE.

The same considerations which we have discussed above, we submit, would warrant a denial of habeas corpus relief even if Rule 12(b)(2) were not controlling here. Under the habeas corpus statute the district judge has discretion to deny relief to an applicant "under certain circumstances", (*Fay* v. *Noia, supra*, 372 U.S. at 438):

> Discretion is implicit in the statutory command that the judge, after granting the writ and holding a hearing of appropriate scope, "dispose of the matter as law and justice require," 28 U.S.C. § 2243; and discretion was the flexible concept employed by the federal courts in developing the exhaustion rule. Furthermore, habeas corpus has traditionally been regarded as governed by equitable principles. *United States ex rel. Smith* v. *Baldi*, 344 U.S. 561, 573 (dissenting opinion). Among them is

the principle that a suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks." * * *

The cases in which the "knowing and deliberate by-pass" standard of *Fay* v. *Noia*, *supra*, 372 U.S. at 439, has been applied to hold that a constitutional claim that could have been raised in direct proceedings could nevertheless be raised collaterally involved objections which had a direct bearing on the determination of a defendant's guilt or innocence. See, *e.g.*, *Kaufman* v. *United States*, *supra*, where the defendant's defense was "prejudiced by the admission of unconstitutionally seized evidence" (394 U.S. at 230); *Fay* v. *Noia*, *supra*, involving the admission of a coerced confession. We have already shown that the claim at issue here—an objection "based on a defect in the institution of the prosecution"—is of a different nature than objections that directly relate to the guilt determining process (*supra*, pp. 32–33, 35). This difference has found recognition in this Court's repeated adherence to its holding that the right to indictment by grand jury, while important and significant, is

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[fn] While the instant proceeding is brought pursuant to 28 U.S.C. 2255, which was enacted in 1948 to permit the habeas corpus petition to be filed in the district court in which petitioner was convicted, it has been held to have effected no change in the scope of the writ or the circumstances under which it should issue. *United States* v. *Hayman*, 342 U.S. 205, 219; *Kaufman* v. *United States*, *supra*, 394 U.S. at 221–222. Moreover, the language of 28 U.S.C. 2225, obviously contemplates the exercise of discretion in granting the relief provided (*Kaufman* v. *United States*, 394 U.S. at 232, n. 1, dissenting opinion of Black, J.).

not a "'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Palko* v. *Connecticut*, 302 U.S. 319, 325, quoting *Snyder* v. *Massachusetts*, 291 U.S. 97, 105; *Hurtado* v. *California*, 110 U.S. 516; *Peters* v. *Kiff*, 407 U.S. 493, 499.

This distinction between the nature of the claim asserted here and in other habeas corpus cases provides a basis for the exercise of the district court's discretion even when no "deliberate by-pass" by petitioner personally has been shown. To the extent that the grand jury is "designed as a means, not only of bringing to trial persons accused of public offences, but also as means of protecting the citizen against unfounded accusation * * *" (*Ex parte Bain*, 121 U.S. 1, 11, quoting a grand jury charge of Justice Field); *United States* v. *Dionisio*, No. 71-229, decided January 22, 1973 (slip op. p. 15, n. 15), the district court can readily determine from a review of the record whether the indictment was "unfounded." In the instant case for example, it is plain that petitioner, who was caught in the act of burglarizing a bank, has suffered no prejudice from the manner in which the grand jury was selected. Any grand juror, black or white, faithful to his oath, would have voted a true bill.[11]

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[11] Compare *Peters* v. *Kiff*, *supra*, which involved a claim of discrimination in the selection of the petit jury as well as the grand jury. The Court, permitting collateral attack, stressed "the great potential for harm latent in an unconstitutional jury-selection system, * * * the strong interest of the criminal defendant in avoiding that harm," and the impossibility of

It is, of course, true that the "exclusion of Negroes from jury service, like the arbitrary exclusion of any other well-defined class of citizens, offends a number of [other] related constitutional values." *Peters* v. *Kiff, supra,* 407 U.S. at 498. Such "exclusion" denies the class of potential jurors the "privilege of participating equally * * * in the administration of justice" (*Strauder* v. *West Virginia,* 100 U.S. 303, 308), and "it stigmatizes the whole class, even those who do not wish to participate, by declaring them unfit for jury service and thereby putting 'a brand upon them, affixed by law, an assertion of their inferiority.' " *Peters* v. *Kiff, supra,* 407 U.S. at 499. To withhold *any* remedy for such a violation, even if a timely objection were made, unless the defendant showed *actual* personal prejudice would impair the vindication of those other constitutional interests. Accordingly, where "timely objection has laid bare a discrimination in the selection of grand jurors" (*Hill* v. *Texas,* 316 U.S. 400, 406), this

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determining "what jury would have been selected under a constitutionally valid selection system, or how that jury would have decided the case" (407 U.S. 504). The grand jury and petit jury, however, perform significantly different functions in our system of criminal justice. While it may be impossible in some cases to say that a properly selected jury would have reached a unanimous decision to convict, it is clear beyond any "reasonable doubt" (*Chapman* v. *California,* 386 U.S. 18) that 12 of 23 grand jurors (representing a cross section of the community) would have voted to indict an individual caught in the act of burglarizing a bank. Confirming the view that the indictment against petitioner could not have been the consequence of racial prejudice against him as a Negro is the fact that the same grand jury also indicted his two confederates, both white.

Court has held that a defendant need not demonstrate prejudice in an individual case. *Ballard* v. *United States*, 329 U.S. 187, 195.

But those policy considerations do not support a holding that even without prejudice, the claim may be made on collateral attack, after his conviction when retrial may be practically impossible. As in this case, such a holding might give petitioner an unwarranted windfall—practical immunity for his crime because of his delay in challenging the proceedings—while at the same time vindicating none of the rights of allegedly excluded citizens—since the system he wants to challenge was actually abandoned years ago. Under these circumstances, we submit, "it is entirely proper" both under Rule 12(b)(2) and 28 U.S.C. 2255 "to take absence of prejudice into account" (*Shotwell Mfg. Co.* v. *United States*, *supra*, 371 U.S. at 363) in determining whether to permit collateral relief." At this point considerations favoring

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" *Peters* v. *Kiff*, supra, upon which petitioner relies (Br. 20) does not require a contrary result. There it was held that a white defendant could challenge the exclusion of blacks in the selection of the Georgia grand and petit juries where the claim was not raised at trial. But *Peters* v. *Kiff* involved a claim that had been consistently rejected by "state courts and lower federal courts" (407 U.S. at 496, n. 4). In such circumstances, this Court has held the failure to make an otherwise useless objection in the state courts is insufficient to bar relief. See *e.g.*, *O'Connor* v. *Ohio*, 385 U.S. 92, holding that a defendant's "failure to object to a practice which Ohio had long allowed cannot strip him of his right to attack the practice following its invalidation by this Court." The right of blacks to assert the claim at issue here "has been recognized and enforced by

the finality of judgments of convictions become compelling. The President's Commission on Law Enforcement and the Administration of Justice, *Task Force Report: The Courts*, 45–47 (1967). See, also, Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 452 (1963); Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. Law Rev. 142, 146–150 (1970); Amsterdam, *Search, Seizure, and Section 2255: A Comment*, 112 U. Pa. L. Rev. 378, 387 (1964).

In sum, we submit that the three year delay in the assertion of a claim that could have been discovered through the exercise of "due diligence," [23] and the clear absence of prejudice, would warrant the exercise of the district court's discretion to deny the petition even without regard to the express waiver provision of Rule 12(b)(2).[24] When, along with these facts, it

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this Court [and lower federal courts] for almost a century" (Pet. Br. 13). Moreover, as noted *supra*, n. 21, *Peters* v. *Kiff* also involved an objection to the petit jury.

[23] Cf. *Illinois* v. *Allen*, 397 U.S. 337, 351 (concurring opinion of Mr. Justice Douglas), noting that while "lapse of time is not necessarily a barrier to a challenge of the constitutionality of a criminal conviction * * * in this case it should be."

[24] The fact that the error is "harmless" would under well settled law warrant the denial of collateral relief. The Great Writ plainly does not issue to cure harmless error. See, *e.g.*, *Chambers* v. *Maroney*, 399 U.S. 42, 52–53; *United States ex rel. DiRienzo* v. *Yeager*, 443 F. 2d 228 (C.A. 3); *Downey* v. *Peyton*, 451 F. 2d 236 (C.A. 4); *Lawrence* v. *Wainwright*, 445 F. 2d 281 (C.A. 5); *Myricks* v. *United States*, 434 F. 2d 629 (C.A. 6); *Ethington* v. *United States*, 379 F. 2d 965 (C.A. 6); *Metropolis* v. *Turner*, 437 F. 2d 207 (C.A. 10); *Wapnick* v. *United States*, 406 F. 2d 741 (C.A. 2). This, of course, is

is not alleged that there was deliberate exclusion of Negroes from the petit jury, and that the system used for the selection of jurors, which petitioner attacks, has been replaced, the exercise of the court's discretion to deny relief is compelling.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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FEBRUARY 1973.

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another factor which distinguishes the instant case from *Kaufman*. While the Fourth Amendment's exclusionary rule, like the rule against discrimination in the selection of grand juries, has been held to reflect "a number of related constitutional values" (*Peters* v. *Kiff*, *supra*, 407 U.S. at 498), independent of the defendant's right to a fair trial (*Terry* v. *Ohio*, 392 U.S. 1, 12–13), it is settled that collateral relief is not available if the admission of the illegally seized evidence did not prejudice the defendant significantly. *Chambers* v. *Maroney*, 399 U.S. 42, 52–53. There is no reason for applying a different rule here.

U.S. GOVERNMENT PRINTING OFFICE: 1973

In the

Supreme Court of the United States

October Term 1972

No. 71-6481

Clarence R. Davis,

Petitioner,

—v.—

United States of America,

Respondent.

PETITIONER'S REPLY BRIEF

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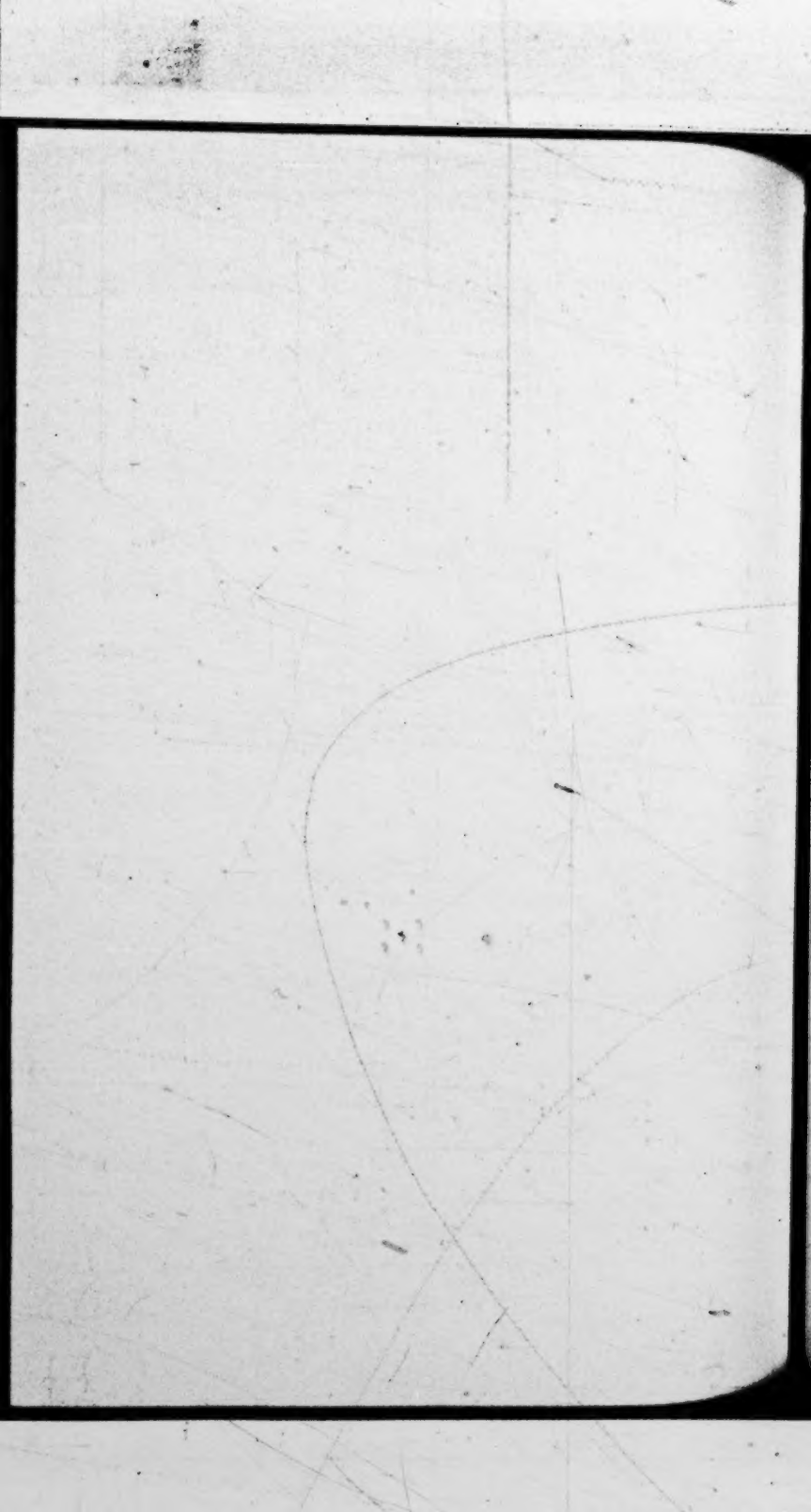

In the

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Respondent.

REPLY BRIEF FOR PETITIONER

1. Since the United States is unable to surmount the unambiguous holdings of *Sanders* v. *United States,* 373 U.S. 1 (1963), and *Kaufman* v. *United States,* 394 U.S. 217 (1969), which import the *Noia* waiver doctrine to Sec. 2255 cases, and the equally unambiguous line of cases which have held racially exclusive grand juries unconstitutional for almost one hundred years, it proposes that the Court treat the systematic exclusion of Negroes from grand juries as mere harmless error (Br., pp. 19-20, 30, 33-34, 35, 39-41, 43 n. 34), and invites the Court to assign the prohibition against racial discrimination in grand jury selection to the dustbin. The government also asserts that jury selection in the Northern District of Mississippi is not infected by racial exclusion (Br., 18-19, n. 10), and in any case the petitioner is guilty (Br., 40).

These are all unusual assertions. They tell the Court that grand juries are only a charade, cf. *Hurtado* v. *California*, 110 U.S. 516, 551-555 (1884) (Harlan, J. dissenting); *United States* v. *Dionisio*, 41 U.S. Law Week 4180, 4184 note 15; that the Court need not bother to allow petitioner to test the exclusionary practices in the Northern District of Mississippi since it was shown in another case that juries are selected fairly in the Northern District of Mississippi, even though the racial exclusion issue was dropped from that case [Br. p. 18, n. 10];* and that a guilty verdict cures all pre-existing constitutional errors.

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* The issue may have been dropped because the defendants in that case were white (Brief on Behalf of Plaintiff in *United States* v. *Polk*, p. 2) and their attorneys might well have thought in 1968, well before *Peters* v. *Kiff*, 407 U.S. 493 (1972), that white defendants had no chance of persuading a court that they were entitled as a constitutional matter to complain about the exclusion of blacks from jury service.

As part of its proof that Negroes were not excluded from jury service in the Northern District of Mississippi, the United States has submitted affidavits from "sixty-seven trial attorneys who since 1964 have tried jury cases in the district court [of the Northern District of Mississippi]" (*Id.* at 7). Every one of those affidavits (with four minor exceptions) are identical to each other except for the material which identifies the affiants. Of the four exceptions, two (Attorneys Darden and Summers) do not include paragraph 3, and two (Attorneys Clayton and Farese) recite that they actually saw a given number of Negroes sitting on a petty jury in one case each. None of the other sixty-five attorneys make any similar concrete statistical references.

The standardized assertion in the affidavits that "non-white persons . . . have been represented on the venires in significant numbers" is comforting news if true, but we would first want to know what the sixty-seven affiants mean by "significant numbers." And for the purpose of exploring the questions raised by the Brief for Petitioner in the instant case at pp. 27-28, one would also be interested in asking those sixty-seven lawyers whether they ever raised the exclusion issue in the Northern District of Mississippi and, if not, the con-

2. The United States suggests that a hearing on the issue of waiver would also be a waste of time: "The district court found 'no plausible explanation of his failure to timely make his objection' and thus refused to disregard the waiver of the objection" (Br., p. 22). Of course the district court found no "explanation," since it declined to grant petitioner a hearing where the issue could be assessed on the basis of proof, rather than on the district court's speculation.

The United States mis-states another facet of the waiver problem by suggesting that lawyers can effectively waive their clients' constitutional rights (Br. 37), simply ignoring this Court's unanimous declaration less than a year ago that " . . . a waiver must be the product of an understanding and knowing decision by the petitioner himself, who is not necessarily bound by the decision or default of his counsel." *Humphrey* v. *Cady*, 31 L.ed. 2d 394, 407 (1972).

3. The United States says that "Unless this Court holds Rule 12(b)(2) of the Federal Rules of Criminal Procedure unconstitutional, the decision below must be sustained" (Br., p. 20). Petitioner makes no such argument. All the Court need do is construe the phrases "constitutes a waiver thereof" and "for cause shown" so that they reflect the *Noia* waiver doctrine. The government concedes, as it must, that the *Noia* doctrine was engrafted upon both the habeas statute and Sec. 2255 as a matter of statutory construction (Br. 30-31). The Court need do no more than that here.

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quote statistical facts upon which their decisions were based. But all those issues of fact require a forum in *this* case, not unilateral assertions from some other case.

4. The brief of the United States makes two plain misstatements of matters of fact. At p. 17 it says, "The use of the [keyman] system, as the Amicus Curiae acknowledges, 'has not . . . by and large [resulted in] deliberate exclusion of blacks' (Br. 19), but has instead resulted in 'unintentional' underrepresentation of Negroes and other groups on jury lists." In fact, Amicus Curiae did not use the word "underrepresentation." It used the word "excluding." There is a difference.

The second clear misstatement occurs at p. 11, n. 7 where the United States says that "petitioner apparently no longer challenges the findings of the two courts below made without a hearing, that he did not in fact make any pre-trial challenge to the selection of the grand jury and thus that the waiver provision of Rule 12(b)(2) is, by its terms, applicable to this case." But on p. 28 of his brief, petitioner clearly states that the question of the pre-trial challenge would be the first order of business at the hearing on remand, assuming there is one. Thus, petitioner has not dropped the claim but merely postponed it to await an evidentiary hearing, where it can be determined after taking of proof.

Respectfully submitted,

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February 1973

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Lumber Co., 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

DAVIS *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 71-6481. Argued February 20, 1973—Decided April 17, 1973

Three years after his conviction for a federal crime, petitioner brought this habeas corpus proceeding on the ground of unconstitutional discrimination in the composition of the grand jury that indicted him. The District Court found that, though petitioner could have done so, he at no stage of the proceedings attacked the grand jury's composition, and it concluded that under Fed. Rule Crim. Proc. 12 (b)(2) he had waived his right to do so. The court also determined that since the challenged jury-selection method had long obtained, the grand jury that indicted petitioner indicted his two white accomplices, and the case against petitioner was "a strong one," there was no "cause shown" under the rule to grant relief from the waiver. *Held:*

1. The waiver standard set forth in Fed. Rule Crim. Proc. 12 (b)(2) governs an untimely claim of grand jury discrimination, not only during the criminal proceeding but also later on collateral review. *Shotwell Mfg. Co.* v. *United States*, 371 U. S. 341, followed; *Kaufman* v. *United States*, 394 U. S. 217, distinguished. Pp. 3–10.

2. The District Court, in the light of the record in this case, did not abuse its discretion in denying petitioner relief from the application of the waiver provision. Pp. 10–13.

453 F. 2d 919, affirmed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, BLACKMUN, and POWELL, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which DOUGLAS and BRENNAN, JJ., joined.

February 1973

SUPREME COURT OF THE UNITED STATES

No. 71-6431

Clifford H. Davis, Petitioner, v. United States. } On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[April 17, 1973]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

We are called upon to determine the effect of Rule 12 (b)(2) of the Federal Rules of Criminal Procedure on a post-conviction motion for relief which raises for the first time a claim of unconstitutional discrimination in the composition of a grand jury. An indictment was returned in the District Court charging petitioner Davis, a Negro, and two white men with entry into a federally insured bank with intent to commit larceny in violation of 18 U. S. C. §§ 2 and 2113 (a). Represented by appointed counsel,[1] petitioner entered a not guilty plea at his arraignment and was given 30 days within which to file pretrial motions. He timely moved to quash his indictment on the ground that it was the result of an illegal arrest, but made no other pretrial motions relating to the indictment.

On the opening day of the trial, following *voir dire* of the jury, the District Judge ruled on petitioner's pre-

[1] Petitioner was represented throughout the trial by competent, court-appointed counsel, whose advocacy prompted the Court of Appeals to complement him saying:

"We have rarely witnessed a more thorough or more unstinted expenditure of effort by able counsel on behalf of a client." *Davis v. United States*, 409 F. 2d 1095, 1101 (CA5 1969).

trial motions in chambers and ordered that the motion to quash on the illegal arrest ground be carried with the case. He then asked twice if there were anything else before commencing trial. Petitioner was convicted and sentenced to 14 years' imprisonment. His conviction was affirmed on appeal. *Davis* v. *United States*, 409 F. 2d 1095 (CA5 1969).

Post-conviction motions were thereafter filed and denied, but none dealt with the issue presented in this case. Almost three years after his conviction, petitioner filed the instant motion to dismiss the indictment, pursuant to 28 U. S. C. § 2255, alleging that the District Court had acquiesced in the systematic exclusion of qualified Negro jurymen by reason of the use of a "key man" system of selection,[2] an asserted violation of the "mandatory requirement of the statute laws set forth . . . in title 28, U. S. C. A. Section 1861, 1863, 1964, and the 5th Amendment of the United States Constitution."[3] His challenge only went to the composition of the grand jury and did not include the petit jury which found him guilty. The District Court, though it took no evidence on the motion, invited additional briefs on the issue of waiver. It then denied the motion. In its memorandum opinion it relied on *Shotwell Mfg. Co.* v. *United States*, 371 U. S. 341 (1963), and concluded that petitioner had waived his right to object to the composition of the grand jury because such a contention is waived under Rule 12 (b) (2) unless raised by motion prior to trial. Also, since the "key man" method of selecting grand jurors had been

[2] The use of the "key man" system was approved in *Scales* v. *United States*, 227 U. S. 203, 210 (1961), affirming 260 F. 2d 21, 44–46 (CA4 1958). The adoption of the Jury Selection and Service Act of 1968, 28 U. S. C. §§ 1861–1869, has precluded its further use.

[3] Petitioner also alleged that a timely oral motion in open court prior to trial was made preserving for him the right to contest the grand jury array, and that a law student who was researching the grand jury array was stopped from seeing him.

openly followed for many years prior to petitioner's indictment; since the same grand jury that indicted petitioner indicted his two white accomplices; and since the case against petitioner was "a strong one," the court determined that there was nothing in the facts of the case or in the nature of the claim justifying the exercise of the power to grant relief under § 12 (b)(2) for "cause shown."

The Court of Appeals affirmed on the basis of *Shotwell*, *supra*, and Rule 12 (b)(2). Because its decision is contrary to those of the Ninth Circuit in *Fernandes* v. *Meier*, 408 F. 2d 974 (CA9 1969), and *Chee* v. *United States*, 449 F. 2d 747 (CA9 1971), we granted certiorari to resolve the conflict.

Petitioner contends that because his § 2255 motion alleged deprivation of a fundamental constitutional right, one which has been recognized since *Strauder* v. *West Virginia*, 100 U. S. 303 (1879), his case is controlled by this Court's dispositions of *Kaufman* v. *United States*, 394 U. S. 217 (1969), and *Sanders* v. *United States*, 373 U. S. 1 (1963), rather than *Shotwell Mfg. Co.* v. *United States*, *supra*, and Rule 12 (b)(2). Accordingly, he urges that his collateral attack on his conviction may be precluded only after a hearing in which it is established that he "deliberately bypassed" or "understandingly and knowingly" waived his claim of unconstitutional grand jury composition. See, *Fay* v. *Noia*, 372 U. S. 391 (1963), and *Johnson* v. *Zerbst*, 304 U. S. 458 (1938).

I

Rule 12 (b)(2) provides in pertinent part that "[d]efenses and objections based on defects in the institution of the prosecution or in the indictment . . . . may be raised only by motion before trial," and that failure to present such defenses or objections "constitutes a waiver thereof, but the court for cause shown may grant relief

from the waiver." By its terms it applies to both procedural and constitutional defects in the institution of prosecutions which do not affect the jurisdiction of the trial court. According to the Notes of the Advisory Committee on Rules, the waiver provision was designed to continue existing law, 18 U. S. C. A. (Fed. Rule Crim. Proc., Rules 1–14), p. 607, which as exemplified by this Court's decision in *United States* v. *Gale*, 109 U. S. 65 (1883), was, *inter alia*, that defendants who pleaded to an indictment and went to trial without making any non-jurisdictional objection to the grand jury, even one unconstitutionally composed, waived any right of subsequent complaint on account thereof. Not surprisingly, therefore, the Advisory Committee's Notes expressly indicate that claims such as petitioner's are meant to be within the Rule's purview:

> "These two paragraphs [12 (b)(1) and (2)] classify into two groups all objections and defenses to be interposed by motion prescribed by rule 12 (a). In one group are defenses and objections which must be raised by motion, failure to do so constituting a waiver.
>
> "Among the defenses and objections in this group are the following: Illegal selection or organization of the grand jury. . . ." 18 U. S. C. A. (Fed. Rule Crim. Proc., Rules 1–14), p. 607.

This Court had occasion to consider the Rule's application in *Shotwell Mfg. Co.* v. *United States*, *supra*, a case involving tax-evasion convictions. In a motion filed more than four years after their trial, but before the conclusion of direct review, petitioners alleged that both the grand and petit jury arrays were illegally constituted because, *inter alia*, "the Clerk of the District Court failed to employ a selection method designed to secure a cross-

section of the population."[4] 371 U. S., at 361–362. Deeming the case controlled by 12(b)(2), the District Court held a hearing to determine whether there were "cause" warranting relief from the waiver provision and it found that "the facts concerning the selection of the grand and petit juries were notorious and available to petitioners in the exercise of due diligence before the trial." *Id.*, at 363. It concluded that their failure to exercise due diligence combined with the absence of prejudice from the alleged illegalities precluded the raising of the issue, and the Court of Appeals affirmed. In this Court, petitioners conceded that Rule 12(b)(2) applied to their objection to the grand jury array, but they denied that it applied to the petit jury. Both objections were held foreclosed by the petitioners' years of inaction and the lower courts' application of the Rule was affirmed.

Shotwell thus confirms that Rule 12(b)(2) precludes untimely challenges to grand jury arrays, even when such challenges are on constitutional grounds.[5] Despite the strong analogy between the effect of the Rule as construed in *Shotwell* and petitioner's 2255 allegations, he nonetheless contends that *Kaufman* v. *United States*,

[4] Petitioner attempts to distinguish *Shotwell* on the ground that the case "involved legal irregularities which did not rise to the dimension of the fundamental constitutional right asserted" herein. (Pet. Brief, p. 18–19). At pp. 362–363 of the Court's opinion in *Shotwell*, however, the majority accepted petitioners' assertion of constitutional deprivation at face value before rejecting on the basis of Rule 12(b)(2) their claims.

[5] We are comforted in this conclusion by the concurrence of all but one of the courts of appeals that have considered the issue. See *Moore* v. *United States*, 432 F. 2d 730, 740 (CA3 1970) (en banc); *Juelich* v. *Harris*, 425 F. 2d 814 (CA7 1970); *United States* v. *Williams*, 421 F. 2d 529, 532 (CA8 1970); *Bustillo* v. *United States*, 421 F. 2d 131 (CA5 1970); and *Poliafico* v. *United States*, 237 F. 2d 97 (CA6 1956). Contra, *Fernandez* v. *Meier*, 408 F. 2d 974 (CA9 1969).

supra, establishes that he is not precluded from raising his constitutional challenge in a federal habeas corpus proceeding.' See *Fay* v. *Noia*, *supra*. We disagree.

In *Kaufman*, the defendant in a bank robbery conviction sought collateral relief under § 2255 alleging that illegally seized evidence had been admitted against him at trial, over a timely objection, and that this evidence resulted in the rejection of his only defense to the charge. The application was denied in both the District Court and the Court of Appeals on the ground that it had not been raised on appeal from the judgment of conviction and, "that a motion under § 2255 cannot be used in lieu of an appeal." 394 U. S., at 223. This Court reversed, however, holding that when constitutional claims are asserted, habeas relief cannot be denied solely on the ground that relief should have been sought by appeal. *Ibid.*

But the Court in *Kaufman* was not dealing with the sort of express waiver provision contained in Rule 12 (b) (2) which specifically provides for the waiver of a particular kind of constitutional claim if it be not timely

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*Petitioner relies on the reasoning of *Fernandez* in arguing that a different waiver rule should apply in § 2255 proceedings. In that case, the defendant argued that the exclusion of Spanish Americans from his grand and petit juries constituted a deprivation of constitutional right. The claim was untimely raised and the Court of Appeals conceded that failure to present it as provided in Rule 12 (b) (2) resulted in a waiver. Relying, however, on this Court's decisions in *Fay* v. *Noia*, 372 U. S. 391 (1963), and *Sanders* v. *United States*, 373 U. S. 1 (1963), that court held that collateral relief could be denied under § 2255 only upon a showing of a "knowing and deliberate by-pass" of a timely objection. Petitioner concedes that the court misread *Sanders*, *supra*, but he argues that it applied the correct waiver rule. Although we find it difficult to conceptualize the application of one waiver rule for purposes of federal appeal and another for purposes of federal habeas, we will nonetheless give consideration to petitioner's claim that the cases interpreting the federal habeas corpus statute set the applicable standard.

asserted. The claim in *Kaufman* was that the applicable provisions of the federal habeas statute by implication forbade the assertion of a constitutional claim of unlawful search and seizure where the defendant failed to assert the claim on appeal from the judgment of conviction.[7] See, *e. g.*, *Sunal* v. *Lange*, 332 U. S. 174, 179 (1947). The Court held that the federal habeas statute did not preclude the granting of relief on such a claim simply because it had not been asserted on appeal, where there was no indication of a knowing and deliberate bypass of the appeal procedure. But here the Government's claim is not that the federal habeas statute itself limits or precludes the assertion of petitioner's claim, but that the separate provisions of Rule 12 (b)(2) do so. *Kaufman*, therefore, is dispositive only if the absence of a statutory provision for waiver in the federal habeas statutes by implication precludes the application to habeas proceedings of the express waiver provision found in the Federal Rules of Criminal Procedure.

Shotwell held that a claim of unconstitutional grand jury composition raised four years after conviction, but while the appeal proceedings were still alive, was governed by Rule 12 (b)(2). Both the reasons for the Rule and the normal rules of statutory construction clearly indicate that no more lenient standard of waiver should apply to a claim raised three years after conviction sim-

[7] The Court in *Kaufman* made reference to the possibility of the denial of § 2255 relief as a result of a deliberate bypass of the suppression procedures established in Rule 41 (e) of the Federal Rules of Criminal Procedure. *Kaufman* v. *United States*, 394 U. S. 217, 227, n. 8 (1970). But it had no occasion to consider that Rule's effects on § 2255 motions since there "[a]ppointed counsel had objected at trial to the admission of certain evidence on grounds of unlawful search and seizure," *id.*, at 220, n. 3, and the District Court's rationale for denying relief was that "this matter was not assigned as error on Kaufman's appeal from conviction and is not available as a ground for collateral attack. . . ." See *id.*, at 219.

ply because the claim is asserted under the federal habeas statute rather than in the criminal proceeding itself.

The waiver provisions of Rule 12 (b) (2) are operative only with respect to claims of defects in the institution of criminal proceedings. If its time limits are followed, inquiry into an alleged defect may be concluded and, if necessary, cured before the court, the witnesses and the parties have gone to the burden and expense of a trial. If defendants were allowed to flout its time limitations, on the other hand, there would be little incentive to comply with its terms when a successful attack might simply result in a new indictment prior to trial. Strong tactical considerations would militate in favor of delaying the raising of the claim in hopes of an acquittal, with the thought that if those hopes did not materialize, the claim could be used to upset an otherwise valid conviction at a time when reprosecution might well be difficult.

Rule 12 (b) (2) promulgated by this Court and, pursuant to 18 U. S. C. § 3771, "adopted" by Congress, governs by its terms the manner in which the claims of defects in the institution of criminal proceedings may be waived. See *Singer* v. *United States*, 380 U. S. 24, 37 (1965). Were we confronted with an express conflict between the Rule and a prior statute, the force of § 3771, providing that "all laws in conflict with such rules shall be of no further force and effect," is such that the prior inconsistent statute would be deemed to have been repealed. Cf. *Sibbach* v. *Wilson and Co.*, 312 U. S. 1, 10 (1941). The Federal Rules of Criminal Procedure do not *ex proprio vigore* govern habeas proceedings, and had Congress in enacting the statute governing federal habeas corpus specifically there dealt with the issue of waiver, we would be faced with a difficult question of repeal by implication of such a provision by the later enacted rules of criminal procedure. But Congress did not deal with the question of waiver in the federal habeas

statute, and in *Kaufman* this Court held that the federal statute not having spoken on the subject of waiver with respect to claims of unlawful search and seizure, a particular doctrine of waiver would be applied by this Court in interpreting the statute.

We think it inconceivable that Congress, having in the criminal proceeding foreclosed the raising of a claim such as this after the commencement of trial in the absence of a showing of "cause" for relief from waiver, nonetheless intended to perversely negate the Rule's purpose by permitting an entirely different but much more liberal requirement of waiver in federal habeas proceedings. We believe that the necessary effect of the congressional adoption of Rule 12 (b)(2) is to provide that a claim once waived pursuant to that rule may not later be resurrected, either in the criminal proceedings or in federal habeas, in the absence of the showing of "cause" which that rule requires. We therefore hold that the waiver standard expressed in Rule 12 (b)(2) governs an untimely claim of grand jury discrimination, not only during the criminal proceeding, but also later in collateral review.

Our conclusion in this regard is further buttressed by the Court's observation in *Parker* v. *North Carolina*, 397 U. S. 790, 798 (1970), decided the year after *Kaufman*, that "whether the question of racial exclusion in the selection of the grand jury is open in a federal habeas corpus action we need not decide." The context of the Court's language makes it apparent that the question was framed in terms of waiver and timely assertion of such a claim in state criminal proceedings. But if the question were left open with respect to state proceedings, it must have been at least patently open with respect to federal habeas review of federal convictions, where Congress is the law giver both as to the procedural rules

governing the criminal trial and the principles governing collateral review.

II

The principles of Rule 12 (b)(2), as construed in *Shotwell*, are not difficult to apply to the facts of this case. Petitioner alleged the deprivation of a substantial constitutional right, recognised by this Court as applicable to state criminal proceedings from *Bush* v. *Kentucky*, 107 U. S. 110 (1883), through *Alexander* v. *Louisiana*, 405 U. S. 625 (1972). But he failed to assert the claim until long after his trial, verdict, sentence, and appeal had run their course. In findings challenged only half-heartedly here the District Court determined that no motion, oral or otherwise, raised the issue of discrimination in the selection of the grand jurors prior to trial. The Court of Appeals affirmed, and on petition for rehearing conducted its own search of the record in a vain effort to see whether the files or docket entries in the case supported petitioner's contention that he had made such a motion. We will not disturb the coordinate findings of these two courts on a question such as this.

The waiver provision of the Rule therefore coming into play, the District Court held that there had been no "cause shown" which would justify relief. It said:

> "Petitioner offers no plausible explanation of his failure to timely make his objection to the composition of the grand jury. The method of selecting grand jurors then in use was the same system employed by this court for years. No reason has been suggested why petitioner or his attorney could not have ascertained all of the facts necessary to present the objection to the court prior to trial. The same grand jury that indicted petitioner also indicted his two white accomplices. The case has no racial overtones. The government's case against petitioner

was, although largely circumstantial, a strong one. There was certainly sufficient evidence against petitioner to justify a grand jury in determining that he should stand trial for the offense with which he was charged. . . . Petitioner has shown no cause why the court should grant him relief from his waiver of the objection to the composition of the grand jury. . . ."

In denying the relief, the court took into consideration prejudice to petitioner. This approach was approved in *Shotwell* where the Court stated:

> "[W]here, as here, objection to the jury selection has not been timely raised under Rule 12 (b)(2), it is entirely proper to take absence of prejudice into account in determining whether a sufficient showing has been made to warrant relief from the effect of that Rule." 371 U. S., at 363.

Petitioner seeks to avoid this aspect of *Shotwell* by asserting that there both lower courts had found that petitioners were not prejudiced in any way by the alleged illegalities whereas under *Peters* v. *Kiff*, 407 U. S. 493 (1972), prejudice is presumed in cases where there is an allegation of racial discrimination in grand jury composition. But *Peters* dealt with whether or not a white man had a substantive constitutional right to set aside his conviction upon proof that Negroes had been systematically excluded from the state grand and petit juries which indicted and tried him. Three Justices dissented from the Court's upholding of such a substantive right on the ground that no prejudice had been shown, and three concurred separately in the judgment. But the three opinions delivered in *Peters*, *supra*, all indicate a focus on the existence of the constitutional right, rather than its possible loss through

delay in asserting it. The presumption of prejudice which supports the existence of the right is not inconsistent with a holding that actual prejudice must be shown in order to obtain relief from a statutorily provided waiver for failure to assert it in a timely manner.

We hold that the District Court did not abuse its discretion in denying petitioner relief from the application of the waiver provision of Rule 12 (b)(2), and that having concluded he was not entitled to such relief, it properly dismissed his application for federal habeas corpus. Accordingly, the judgment of the Court of Appeals is

Affirmed.

SUPREME COURT OF THE UNITED STATES

No. 71-6481

Clifford H. Davis, Petitioner,
v.
United States.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[April 17, 1973]

MR. JUSTICE MARSHALL, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN join, dissenting.

The opinion of the Court obscures the only sensible argument for the result the majority reaches. I am not persuaded by that argument, and find the majority opinion clearly defective. I believe that Rule 12 (b)(2), properly interpreted in the light of the purposes it serves and the purposes served by making available collateral relief from criminal convictions, does not bar a prisoner from claiming that the grand jury that indicted him was unconstitutionally composed, if he shows that his failure to make that claim before trial was not "an intentional relinquishment or abandonment of a known right or privilege," *Johnson* v. *Zerbst*, 304 U. S. 458, 464 (1938). But first there is some underbrush to be cleared away.

Davis challenged the "key man" system of selection of grand jurors used in the Northern District of Mississippi in 1968, when he was indicted, because it was implemented to exclude qualified Negroes from the grand jury.[1] Cf. *Glasser* v. *United States*, 315 U. S. 60, 85–87

[1] Davis alleged, in part:

"(b) that the jury commissioner and Clerk of Court for the Northern District of Mississippi for the past 20 years implementing the "Keyman" and "Selectors," system cause nought to token in their

(1942); *Dow* v. *Carnegie-Illinois Steel Corp.*, 224 F. 2d 414 (CA3 1955). The Court notes that the use of the "key man" system was approved by this Court in *Scales* v. *United States*, 367 U. S. 203 (1961).[3] This observation is both irrelevant and misleading. It is irrelevant because the Court's holding today bars prisoners from raising meritorious claims not raised before trial.[4] A prisoner like Davis could not contend after today's decision, for example, that federal jury commissioners had simply refused to place the names of Negroes in the jury box used in 1968. That, of course, would have been unconstitutional. See *Alexander* v. *Louisiana*, 405 U. S. 625, 628–629 (1972); *Hill* v. *Texas*, 316 U. S. 400 (1942).[5] The Court's observation is misleading be-

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selection of prospective qualifying negro jurymen because of their race and color in violation of Section 1863.

"(e) that the Northern District Court has by its affirmative action taken for the past 20 years has acquiesced to systematically, purposefully, unlawfully and unconstitutionally excluded the prospective qualified resident negroes from the Grand Jury box in violation of Section 1864.

"(d) that the petitioner being a member of the negro race has been prejudiced by the aforesaid violation caused by the violators in carrying out their duties, and has denied petitioner his constitutional right, guaranteed to him by the Sixth Amendment, the right to a fair cross-section of the community." App. 7.

[3] Under a "key man" system, jury commissioners ask persons who are thought to have wide contacts in the community to supply the names of prospective jurors.

[4] Similarly, the Jury Selection and Service Act of 1968, 28 U. S. C. §§ 1861–1869, can be administered in an unconstitutional manner. Its adoption might have some bearing on our decision to review a holding that the "key man" system used in Mississippi in 1968 was constitutional, but the new Act is plainly irrelevant to the question presented by this case.

[5] Those cases involved discrimination unconstitutional because of the Equal Protection Clause of the Fourteenth Amendment. But the Due Process and Grand Jury Clauses of the Fifth Amendment make unconstitutional the same discrimination in the federal system. *Bolling* v. *Sharpe*, 347 U. S. 497, 499 (1954).

cause in *Scales* the Court said only that "no impropriety in the method of choosing grand jurors has been shown," as to a grand jury convened in the Middle District of Tennessee in 1955, 367 U. S., at 206 n. 2, 259. I doubt that the Court meant to suggest that the use of a "key man" system was immune from constitutional attack. Indeed, *Carter* v. *Jury Commission*, 396 U. S. 320 (1970), and the cases there cited, show that systems essentially the same as a "key man" system may be administered in an unconstitutional manner.[4]

To the extent that our prior decisions speak to the issue in this case, the Court's decision today seems inconsistent with them. The Court purports to distinguish *Kaufman* v. *United States*, 394 U. S. 217 (1960), for example, on the ground that we were there "not dealing with the sort of express waiver provision contained in Rule 12 (b)(2)." I had not thought that words were quite so magical as that distinction makes them. It is true, of course, that Rule 12 (b)(2) provides that "[d]e-

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[4] The Court also notes that its conclusion is "buttressed by the Court's observation in *Parker* v. *North Carolina*, 397 U. S. 798 (1970) . . . that 'whether the question of racial exclusion in the selection of the grand jury is open in a federal habeas corpus action we need not decide.'" I am at a loss to understand how that observation buttresses the Court's holding today. In *Parker* we were reviewing a state court's decision to deny collateral relief under state law. The state court had refused to consider Parker's claim that the grand jury was unconstitutionally composed because he had failed to raise the claim before trial. That was either an adequate state ground, in a procedural sense, or a construction of the state collateral relief statute. No matter how considered, though, the Court clearly had no jurisdiction to consider the constitutional claim. It would have been odd indeed had we decided that Parker's claim could or could not be raised in a federal habeas corpus action. The observation on which the majority relies can only mean that the question had not then been decided by this Court. I fail to understand how the fact that a question had not been resolved supports any particular resolution of a similar question. In the sense of "buttressed" used by the majority, *Parker* also buttresses my position.

fenses and objections based on defects in the institution of the prosecution . . . may be raised only by motion before trial. . . . Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver." *Kaufman* involved a claim that the prisoner was convicted on the basis of evidence obtained in an unconstitutional search. And Rule 41 (e) of the Federal Rules of Criminal Procedure provides that a motion to suppress the use of the evidence obtained in an unlawful search "shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing."

In *Kaufman*, we indicated that the failure to make a timely motion to suppress would permit the § 2255 court to deny relief where that failure was a deliberate bypass of the orderly procedures set out in the Rules of Criminal Procedure. 394 U. S., at 227 n. 8. Relief under § 2255 would be barred only if there had been an intentional relinquishment of a known right.[4] Rule 41 (e) does not use the apparently crucial word "waiver." But its structure is basically the same as that of Rule 12 (b) (2): the motions shall be made at a certain time, and failure to make them may be excused for cause. Nothing in the

[4] Kaufman had raised the search issue at trial, but his counsel on appeal did not pursue it. 394 U. S., at 220 n. 3. Ordinarily, the failure to pursue a claim in the Court of Appeals bars further review. It does so in the nature of things with respect to consideration by the Court of Appeals. And as to review in this Court, see *Lawn v. United States*, 355 U. S. 339, 362 n. 16 (1958).

That a rule makes a waiver "express," rather than a series of holdings doing the same, should affect analysis only if the fact that the waiver is "express" makes some difference in terms of policy. The Court offers no reasons why the "express" waiver bears on any relevant policies of § 2255.

opinion of the Court suggests why the use of the word "waiver" makes such a difference, so that *Kaufman* permits consideration of claims not made in the time set by Rule 41 (e) in a § 2255 proceeding, while claims not made in the time set by Rule 12 (b)(2) may not be considered. There is a clear line of cases in the courts of appeals holding that failure to make a timely motion to suppress evidence bars an attempt to raise the Fourth Amendment issue on appeal. See, *e. g.*, *United States* v. *Ellis*, 461 F. 2d 962 (CA2 1971); *United States* v. *Volkell*, 251 F. 2d 333 (CA2 1958), and cases cited therein. Certainly the use of the word "waiver" in Rule 12 (b)(2) does not make any clearer the notice to attorneys that the failure to make a timely claim about the composition of the grand jury will bar later attempts to raise that claim.

In light of the similarity between *Kaufman* and this case, the only way that I can understand the Court's action is to assume that the Court believes there are strong reasons of policy justifying "an airtight system of forfeitures," *Fay* v. *Noia*, 372 U. S. 381, 432 (1963), with respect to a claim that the grand jury was unconstitutionally composed, reasons that are not applicable to a claim that evidence unconstitutionally seized was used at trial. All that I can find in the opinion of the Court, however, is one sentence referring to such policy considerations: "Strong tactical considerations would militate in favor of delaying the raising of a claim in the hopes of an acquittal, with the thought that if those hopes did not materialise, the claim could be used to upset an otherwise valid conviction at a time when reprosecution might well be difficult."[1]

That, I submit, is once again both irrelevant and misleading. It is misleading because it relies on a mechan-

[1] The sentence preceding that one in the opinion of the Court simply says that some incentive to raise the claim is necessary. It does not say why the system of foreclosures must be airtight.

jeal invocation of the difficulties of reprosecution in a setting where those difficulties are patently quite small. When evidence used at trial is ordered suppressed and a retrial required, the prosecution must reconstruct its case with a new focus; it may have to gather new evidence, or find new witnesses, or it may have to elicit new testimony from witnesses who testified before. In such a setting, there may well be difficulties in reprosecution. But when a new trial is required so that an indictment may be returned by a properly-constituted grand jury, those difficulties simply do not arise. Nothing in the previous trial must be redone; indeed, the prosecution could present its entire case through the testimony given at the previous trial, if it showed that its witnesses were now unavailable and thus that the alleged difficulties in reprosecution were real. Cf. *Mattox* v. *United States*, 156 U. S. 237 (1895). All that the prosecution might lose is the enhancement of credibility, if any, that the actual presence of the witnesses could lend their testimony.

The Court's reference to "strong tactical considerations" is irrelevant because a prisoner would properly be held to have intentionally relinquished his right to raise the constitutional claim if he failed to raise it for tactical reasons. The only issue in this case is whether one who claims that he did not intentionally relinquish a known right is to be afforded the opportunity to prove that claim, as a step toward establishing that his rights were in fact infringed. Saying that Davis, who makes just such a claim, cannot be allowed to prove it because some other prisoners might have made a tactical choice not to raise the underlying issue, is just not responsive to his argument.[2]

[2] The difficulties in proving that a tactical choice was made not to raise the grand jury claim are, so far as I can tell, no different from proving that a tactical choice was made not to make a motion to suppress or to object to a prosecutor's comments on a defendant's

The Solicitor General has urged on us policy considerations that at least bear on the decision, whether the Government's interest in enforcing an airtight system of forfeitures with respect to claims going to the composition of the grand jury is greater than its interest in enforcing a similar system with respect to claims going to the admission of illegally seized evidence. He argues that the crucial difference lies in the ease with which the prosecution can reconstruct its case on a proper basis. It is relatively easy, he says, to remedy the return of an indictment by an unconstitutionally composed grand jury. All that must be done is to convene a properly composed grand jury. But if the result of a finding of error is to wash out not just the indictment but also an entire trial, that error is very costly to legitimate interests in economy. Thus, failure to raise a claim relating to the composition of the grand jury prior to trial may entail large costs. In contrast, the Solicitor General suggests, failure to raise a claim before trial relating to the use of the fruits of an unconstitutional search is not quite so costly. Whenever the finding that the search was unlawful is made, the prosecution will have to reconstruct its case rather substantially. New witnesses may have to be found, and more emphasis must be placed upon the testimony of witnesses that is not tainted by the search. There is, on this view, a very important reason for enforcing an airtight system of foreclosures where the claim is that an easily remedied error has been made—it is simply much more costly to require retrials in those cases.

That argument undoubtedly has some force. But it also goes too far, for it is inconsistent with the power given to reverse a conviction on the basis of plain error

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failure to testify, both decisions to which this Court has applied the traditional test of waiver. *Kaufman* v. *United States*, 394 U. S. 217 (1969); *Camp* v. *Arkansas*, 404 U. S. 69 (1971).

to which no objection had been made. Rule 52 (b), Federal Rules of Criminal Procedure. Improper arguments by a prosecutor in his closing argument may be plain error, for example. *Doty v. United States*, 416 F. 2d 887, 890-891 (CA10 1969), and cases cited. Yet timely objection might have cut off the improper argument at a point when an admonition to the jury to disregard them would adequately protect the defendant's rights. A system that permits reversal on the ground of plain error to which no objection had been made but prohibits reversal on the ground that timely objection to the composition of the grand jury had not been made by a defendant who did not intentionally relinquish his right to object, and that justifies the latter rule in terms of governmental interests in economy, seems to me perverse.

The Solicitor General's argument is unpersuasive, ultimately, not for the reasons just given alone, but also because the legitimate governmental interests that support a strict system of forfeitures with respect to claims about the composition of the grand jury are, in my view, outweighed by other important public interests.* First, and most important in this case, we must assure that no one is excluded from participation in important democratic institutions like the grand jury because of race. Second, convicted offenders will be more amenable to rehabilitation when they know that all their claims of unfairness have been considered, unless they deliberately

*Since nothing distinguishes this case from others involving, for example, claims of illegal searches, *Kaufman* v. *United States*, *supra*, in terms of the governmental interest in finality in criminal litigation, I do not discuss that interest here. The Government must be able to assert interests peculiar to grand jury claims in order to show that those interests outweigh countervailing public interests served by leaving those claims open to later determination.

refrained from raising them at an earlier point. Finally, providing the opportunity to raise such claims at any point in the process, so long as the offender did not willingly conceal them for strategic reasons, helps guarantee that the process of criminal justice is fair, and does so without benefiting someone who was delinquent in his attempts to preserve the fairness of the process.

"For over 90 years, it has been established that a criminal conviction of a Negro cannot stand under the Equal Protection Clause of the Fourteenth Amendment if it is based on an indictment of a grand jury from which Negroes were excluded by reason of their race. *Strauder* v. *West Virginia*, 100 U. S. 303 (1880); *Neal* v. *Delaware*, 103 U. S. 370 (1881)." *Alexander* v. *Louisiana*, 405 U. S. 625, 628 (1972). "People excluded from juries because of their race are as much aggrieved as those indicted and tried by juries chosen under a system of racial exclusion." *Carter* v. *Jury Commission*, 396 U. S. 320, 329 (1970). When it fulfills its proper function, the grand jury is a central institution of our democracy, restraining the discretion of prosecutors to institute criminal proceedings. Cf. *United States* v. *Dionisio*, *ante*, at — (1973); *Wood* v. *Georgia*, 370 U. S. 375, 390 (1962). Although there may be other ways to vindicate the right of every qualified citizen to participate in the grand jury without discrimination based on race, *Carter* v. *Jury Commission*, *supra*, this Court has consistently allowed criminal defendants to assert the rights of excluded groups without requiring that they show prejudice in the particular case. *Ballard* v. *United States*, 329 U. S. 187, 195 (1946). This is contrary to the general rule that no one has standing to assert the rights of others, *Moose Lodge No. 107* v. *Irvis*, 407 U. S. 163, 166–167 (1972). It is justified by the importance of assuring every opportunity to raise claims of unconstitutional discrimination in the selection

of grand juries. That principle alone, in my view, would warrant a very restrictive view of attempts to foreclose the opportunity to raise such claims.

But there is more. Offenders who have been indicted by unconstitutionally composed grand juries undeniably are aggrieved. There is a paramount public interest that the process of criminal justice be fair. As we said in *Kaufman v. United States*, 394 U. S., at 226, "The provision of federal collateral remedies rests . . . upon a recognition that adequate protection of constitutional rights relating to the criminal trial process requires the continuing availability of a mechanism for relief." The function of collateral relief "has been to provide a prompt and efficacious remedy for whatever society deems to be intolerable restraints. Its root principle is that in a civilized society, government must *always* be accountable to the judiciary for a man's imprisonment: if the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release." *Fay* v. *Noia*, 372 U. S. 391, 401–402 (1963) (emphasis added). The traditional scope of collateral relief requires, again, that prisoners be afforded the broadest possible opportunity to present claims that their detention is the result of an unconstitutional procedure.[10]

I do not deny that there is an interest in enforcing compliance with reasonable procedural requirements by a system of forfeitures, so that claims will be raised at a time when they may easily be determined and necessary corrective action taken. But I do not believe that the system of forfeitures must be so comprehensive and rigid that a person may not raise a claim of discrimination in

[10] Indeed, this Court has suggested that any narrowing of those opportunities would itself be an unconstitutional suspension of the writ of habeas corpus, Art. I, § 9, cl. 2. *Fay* v. *Noia*, 372 U. S. 391, 406 (1963); *Sanders* v. *United States*, 373 U. S. 1, 11–12 (1963).

the selection of the grand jury even though he made no deliberate, informed choice to forego the claim. Such a system too grievously affects other important interests.

With these principles in mind, the resolution of this case is not difficult. Rule 12 (b)(2) provides that "the court for cause shown may grant relief from the waiver." I would hold that, when a prisoner shows that his failure to raise a claim of discrimination in the selection of the grand jury was not an intentional relinquishment of a known right, he has shown cause for relief from the waiver.[11] The prior cases, which Rule 12 (b)(2) is said to have continued, did not examine in any detail the circumstances in which failure to object was held to constitute a waiver. See, *e. g.*, *United States* v. *Gale*, 109 U. S. 65 (1883); *In re Wilson*, 140 U. S. 575 (1891). Cf. *Kohl* v. *Lehlback*, 160 U. S. 293 (1895). It is clear that in none of those cases did the prisoner show that his failure to object was not an intentional relinquishment of a known right.[12]

[11] I do not understand the Court's contention that this is a "liberal requirement." It is true of course that waiver will not be presumed from a silent record. Cf. *Carnley* v. *Cochran*, 369 U. S. 506, 516 (1962). But in a case like this, the record is not silent; it shows that the defendant did not object to the composition of the grand jury. (I do not quarrel with the Court's reliance on the finding made below that, despite Davis' allegations, no pretrial objection was made.) Thus, the burden is on him to show that he did not know of his right to object to the composition of the grand jury, or that, knowing of his rights, he nonetheless did not exercise them because, for example, he feared that to do so would generate hostility that would adversely affect his chances of acquittal.

[12] In a related setting, this Court has interpreted language that might be thought to preclude later claims in a manner similar to that I would adopt here. *Sanders* v. *United States*, 373 U. S. 1 (1963), involved the question, whether failure to raise a claim in a previous petition for collateral relief precluded consideration of that claim in a later petition. There was a statutory provision that "[t]he sentencing court shall not be required to entertain a

Shotwell Manufacturing Co. v. *United States*, 371 U. S. 341 (1963), does not reflect a contrary interpretation of Rule 12 (b)(2). There a corporation and two of its officers were indicted for attempted income tax evasion. Four years after trial, they attacked the composition of the grand and petit juries. They contended that there was newly discovered evidence that the Clerk of the District Court had failed to use a method of selecting grand jurors designed to secure a cross-section of the community. Thus, they did not contend that they had not known of their right to be indicted by a representative grand jury. Clearly, to establish that that right had been infringed, they had to find evidence relating to the method of selection. The District Court found that such evidence was "notorious and available to petitioners in the exercise of due diligence before trial." *Id.*, at 363. I have little difficulty in saying that, where one must present evidence in order to support a constitutional claim, the failure to exercise due diligence in searching for that evidence is a deliberate relinquishment of that claim.

The interpretation I would give to "good cause" is supported, finally, by this Court's insistence that acquiescence in the loss of constitutional rights is not lightly to be assumed. See *Johnson* v. *Zerbst*, 304 U. S. 458, 464 (1938); *Aetna Insurance Co.* v. *Kennedy*, 301 U. S. 389, 393 (1937), and cases cited therein, at n. 2. It is well established that a procedural rule that unreasonably precludes the vindication of constitutional rights itself raises serious constitutional questions. See, *e. g.*, *Reece* v. *Georgia*, 350 U. S. 85 (1955); *Davis* v. *Wechsler*, 263

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second or successive motion for similar relief on behalf of the same prisoner." 28 U. S. C. § 2225. The term "similar relief" was interpreted to mean relief based upon the same claim that was presented before, or upon a claim that had intentionally been relinquished. 373 U. S., at 15-18.

U. S. 23 (1923); *Williams* v. *Georgia*, 349 U. S. 375, 399 (1955) (opinion of Clark, J.). In *Johnson* v. *Zerbst*, *supra*, this Court adopted a definition of waiver that can be applied to serve all valid interests in barring untimely assertions of constitutional rights while not precluding claims by defendants who have not abused the procedural system. No convincing reasons have been advanced to adopt a more restrictive definition of waiver in this case. If Davis did not intentionally relinquish a known right, I do not see any valid interest in keeping him from asserting that right in this § 2255 action.

Davis alleged in his motion for collateral relief that "he had not waived or abandoned this right to contest the Grand Jury array." App. 8. This is enough, in a motion submitted by a prisoner unaided by counsel, to constitute an allegation that he had not intentionally relinquished a known right. Cf. *Haines* v. *Kerner*, 404 U. S. 519 (1972). It is a factual allegation not refuted by the record in the case, 28 U. S. C. § 2255, and Davis should have an opportunity to prove this allegation. I would therefore reverse the judgment below.